Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

October Term, 1999

In The Matter Of
The Minor Child KAH
d.o.b. 9/21/85

S.H.,
Petitioner

On Petition for Writ of Certiorari To The Supreme Court of the State of Alaska

PETITION FOR WRIT OF CERTIORARI

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Admitted to Appear Before
This Court on January 12, 1976

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Alaska's ARPC 1.8(e) ethical prohibition to Alaskan attorney loans to clients when applied to preclude an Alaskan attorney from making post-retention interest-free loans for living expenses to his destitute client possessed of claims under the Jones Act or General Maritime Law, when said loans are made for the sole purpose of allowing that client to withstand the pressure to unfairly settle that client's claims occasioned by litigation delays, is overbroad and void as applied in violation of provisions of the comprehensive tort recovery regime established by Congress in the Jones Act, and the General Maritime Law it modifies, as well as the United States Constitution's Supremacy Clause Art. VI, First Amendment guarantee to freedom of association, Constitutional guarantee of meaningful access to the courts (irrespective of its source), and the Fourteenth Amendment guarantee of equal protection (individually or in conjunction) under the principals of *Railroad Trainmen v. Virginia Bar Association*, 377 US 1 (1964) and its progeny.

2. Whether Alaska's ARPC 1.8(e) ethical prohibition to Alaskan attorneys as applied to preclude an Alaskan attorney from making a post-retention, interest-free loan to a destitute client for living expenses, possessed of any civil legal remedy when made for the sole purpose of allowing that client to withstand the pressures to unfairly settle that client's claims, is over broad and void for the aforesaid Constitutional reasons set forth in issue Number 1, irrespective of the federal statutory or general maritime law nature of the client's claims.

LIST OF PARTIES TO THE PROCEEDINGS

The Petitioners:

SH is the mother of KAH, the minor daughter and sole heir of PKH, a Jones Act seaman killed while fishing in Alaska. SH was appointed personal representative of the PKH estate and was the Petitioner in the Alaska Superior Court of General Jurisdiction and the Appellant in the Alaska Supreme Court.

Gerald W. Markham, Attorney for SH in both lower court proceedings (and here), could arguably be said to be a real party in interest in this proceedings in as much as he will ultimately be paid the sums in dispute if SH is successful in her Petition.

The Respondents:

The Alaska Superior Court, Third Judicial District. This issue arose in the context of an *ex parte* minor (closed) settlement proceeding brought before the Alaska Superior Court's Standing Master and then the Alaska Superior Court pursuant to Alaska Civil Rule 90.2 (see in pertinent part Apx. L pg. 7-9), to approve a settlement of the maritime wrongful death action brought by SH on behalf of her daughter KAH, and for approval of her attorney's fees and costs. No other party was present or represented in these proceedings; the minor KAH's interests vis-a-vie her parent SH and her attorney being represented by the Alaska Superior Court in its guardianship capacity. For that reason Petitioner believes the Alaska Superior Court, Third Judicial District, would be the proper party Respondent.

The Alaska Bar Association, and the **Alaska Supreme Court.** Alaska has a unified Bar in which the Alaska Bar Association is a statutory agency subject to the ultimate control of the Alaska Supreme Court. Under rules promulgated by that court, the Alaska Bar

Association proposes attorney ethical rules; and if it approves of them, the Supreme Court adopts them. That was the case with ARPC 1.8(e) adopted July 15, 1993. When Petitioner filed her Notice of Appeal to the Alaska Supreme Court, that Court entered an Order (Apx. K) directing the Alaska Bar Association to file an "Amicus" brief in response to SH's appeal challenging the validity of ARPC 1.8(e), the Bar Association also appeared orally and argued the validity of this rule as applied here. Following argument the Alaska Supreme Court affirmed the validity of ARPC 1.8(e) and upheld the Superior Court judgment denying SH's request for funds from the settlement to repay the loan at issue (Apx. A). Accordingly Petitioner believes the Alaska Bar Association is a proper party Respondent. The Alaska Supreme Court could be as well insofar as it was defending its own rule below (and the judgment of its subordinate Superior Court). Compare *Department of Labor v. Triplett*, 494 US 715 (1990).

KAH. If ARPC 1.8(e) could be upheld, so too would the judgment of the Superior Court refusing SH's request for repayment of the loans at issue from KAH's settlement funds; therefore the minor child KAH could be said to be a real party in interest Respondent. However in as much as the amounts in controversy are relatively small (approximately $2,000), and the Alaska Supreme Court's direction to the Alaska Bar Association to file an amicus brief to (and argue) the validity of Rule 1.8(e) also protects KAH's interest, Petitioner SH suggests that despite a technical conflict between her interests and her daughter's, that KAH would not be benefitted by this Court's appointment of a guardian ad litem or counsel to represent her interests (at least not at KAH's expense).

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I.
OPINIONS AND ORDERS REPORTED

The decision below will be reported as *In Re.: KAH*, 967 P.2d. 91 (Ak., 1997); see Apx. A.

II.
BASIS OF JURISDICTION

A. Jurisdiction In This Court

Petitioner filed a timely Petition for Rehearing to the Alaska Supreme Court's decision of November 27, 1998 (Apx. A) as permitted by Alaska App. Rule 506(b). This Petition for Certiorari is timely if filed within 90 days of the Alaska Supreme Court's December 22, 1998 order denying rehearing (Apx. B). Supreme Court Rule 13.1, 13.3. 28 USCA §1257(a) provides certiorari jurisdiction for this Court's review of the Alaska Supreme Court.

B. Jurisdiction In the Lower Courts

The Alaska Superior Court had original jurisdiction pursuant to AS 22.10.020(a)-(b), the Jones Act, 46 USC §688, and the "Savings to Suitors" clause, 28 USC §1333. The Alaska Supreme Court had appellate jurisdiction pursuant to AS 22.05.010 and Alaska Appellate Rule 202.

III.
STATEMENT OF THE CASE

P.K.H. was killed while working as a fisherman in Alaska in 1993, leaving as his sole heir KAH, age seven. KAH's mother SH, appointed personal representative of PKH's estate, retained Alaska Attorney Gerald Markham (your undersigned) to file a wrongful death action on KAH's behalf under the Jones Act, 46 USCA §688 (*KAH* Apx. A pg. 2).

By 1994 SH's financial situation was bleak so her attorney guaranteed a several hundred dollar loan for her, paid over the course of the next six months on the condition that SH would repay it from the proceeds of her action. Despite the loan, SH and her two daughters were evicted from their residence and living in a car by the summer of 1994. After a brief move to Wisconsin to live with her father, SH was advised that all hopes of a pre-litigation settlement had ended and she was needed in Alaska to locate evidence and give her deposition. Financially unable to afford to return, SH asked her attorneys to lend funds for airfare and an apartment in Alaska, and $5,025 was wired (*KAH* Apx. A pg. 2-3).

In 1995 SH again sought loans of her attorney to "get by". Her attorney lent her $1,000 in response to that request, as well as some small amounts for "cigarettes and cosmetics" in connection with her deposition. The loans totaled under $7,000 when the wrongful death suit settled.[1]

Pursuant to local rules, SH sought master approval of her attorney's contingency fee ($216,692.63), litigation costs ($15,012.10), and loans. The master approved all but the loans. A timely February 1, 1996 motion urged the loans

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[1] Following an October 6, 1995 mediation in the face of a November 1995 trial scheduled over defendant's plea for "more time". The mediator's affidavit (a former Alaska Superior Court judge) reflects SH's counsel's efforts succeeded in raising pre-litigation offer of $175,000 to KAH to $665,000, and that defendant's threats of "delay" were a major factor in his recommendation she accept it. *KAH* Apx. A-3; Apx. E-2.

were for necessary living expenses, and raised all of the issues here (Apx. D). The master responded with an additional $3,050 for the airfare to fly SH and her daughters to Alaska and other "costs of litigation", but denied the living expenses. (*KAH* Apx. A, 3-4; Apx. F). A timely motion to reconsider amplifying on the issues before the master was filed May 23, 1996 (Apx. G) to the Alaska Superior Court having original jurisdiction of the issue, but denied on June 24, 1996 (Apx. H).

A timely appeal was then taken to the Alaska Supreme Court on July 15, 1996 (Apx. I), in which all issues here were again raised. (See excerpt Appellant's Brief, Apx. J.) In view of its *ex parte* nature, the Supreme Court ordered the Alaska Bar Association to file an amicus response to the validity of ARPC 1.8(e) (Apx. K). The Association of Trial Lawyers of America (ATLA) also filed an amicus brief; see *KAH* Apx. A pg. 4; compare *Department of Labor v. Triplett*, 494 US 715 (1990). The Alaska Supreme Court then affirmed in all respects (*KAH* Apx. A).

ARGUMENT

I. SUPREME COURT RULE 10 CONSIDERATIONS FOR GRANTING CERTIORARI

1. Conflict Between State Supreme Court Decisions On An Important Federal Question

This Petition seeks review of *KAH*, supra, which

conflicts with other state supreme court decisions[2] on an important question of federal law[3] common to seamen's injury and death (and general injury) litigation conducted throughout our nation's state[4]

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[2] *Louisiana State Bar Assoc. v. Edwins*, 329 So.2d. 437, 446 (La., 1976); and *NAACP v. Harrison*, 116 SE.2d. 55 (Va., 1960); See also *Dupis v. Faulk*, 609 So.2d. 1190 (La. App. 3rd, 1992); *State Ex. Rel. Okl. Bar Assoc. v. Smolen*, 837 P.2d. 894, 899 (Okl., 1992; Kauger J. dissenting); *Mississippi Bar v. Attorney HH*, 671 So.2d. 1293, 1299 (Miss., 1995; Lee and McRae dissenting). *Dombey, Tyler, Richards & Greiser v. Detroit T&IR Co.*, 351 F.2d. 127, 131 (Smith .J. concurring in result); *In Re. Ruffalo*, 370 F.2d. 447 (6th Cir., 1966, Edward J dissenting) rev'd on other grounds, 390 US 544 (1968), and *Florida Bar v. Taylor*, 648 So.2d 1190 (Fla., 1994).

[3] The validity of ARPC 1.8(e) which *KAH* held prohibits attorneys post-retention loans to indigent clients for basic living expenses so as to withstand the pressures of litigation delays that force them to unfairly settle their claims (hereinafter referred to as "humanitarian loans"). See infra pg. 7 fn. 8.

[4] ARPC 1.8(e) was adopted on July 15, 1993 verbatim from American Bar Association (herein ABA) Model Professional Code (herein MPC) 1.8(e) promulgated in 1983, and adopted by a majority of American jurisdictions. A (growing) modern minority of jurisdictions have rejected the prohibition as it pertains to humanitarian loans either by rule or judicial decision. See *In Re.: KAH* at 14.

and federal courts.[5] See U.S. Supreme Court Rule 10(b). Compare *Fuller v. Oregon*, 417 US 40, 49 (1974); *Dun & Bradstreet Inc. v. Greenmoss Bldrs., Inc.*, 472 US 749, 753 (1985).

2. *KAH* Decides Important Questions of Federal Law In A Manner that Conflicts With Relevant Decisions Of This Court,[6] Or Alternatively, That Should Be Settled By This Court.[7]

Historical legal analysis overwhelmingly demonstrates that by the time of the passage of FELA and

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[5] Virtually every US District Court's local rules adopt the ethical rules of the state in which they sit and enforce state disciplinary judgments subject only to very narrow exceptions. See Wolfram, supra, at 142. Compare *In Re. Dawson* 609 F.2d. 1139 (5th Cir., 1980). The practical effect of MPC 1.8(e) is to prohibit attorneys from making humanitarian loans essential to the prosecution of federal law claims in all but a few jurisdictions. Compare *Rand v. Monsanto*, 926 F.2d. 596 (7th Cir., 1991).

[6] *See United Transportation Workers Union v. Michigan Bar*, 401 US 576 (1971); *RailRoad Trainmen v. Virginia Bar*, 377 US 1 (1964); *United Mine Workers v. Illinois Bar Assoc.*, 389 US 217 (1967); *Bates v. State Bar of Arizona*, 433 US 350, 376 Fn. 32 (1977); *Zauderer v. Office of Disciplinary Counsel*, 471 US 626, 643 (1984); *Shapero v. Kentucky Bar Assoc.*, 486 US 466, 470 (1988). See also *Floridan Bar v. Went For It, Inc.*, 515 US 618, 635 (1995, Kennedy J dissenting).

[7] Supreme Court Rule 10(c). Compare *Rice v. Sioux City Cemetery*,349 US 70 (1955); *All State Ins. Co. v. Hague*, 449 US 302 (1981).

the Jones Act, it was a time-honored judicially approved, common practice of American lawyers to make humanitarian loans to their indigent clients to withstand litigation delays. This practice may have even risen to the level of an ethical duty to the extent that the lawyer was able. Congress was undoubtedly aware of this practice and assumed it would continue when it adopted these comprehensive tort regimes.

Alternatively even if it cannot be conclusively established that Congress anticipated that seamen would receive small loans from their counsel to enable them to withstand litigation delays, the Jones Act and general maritime law occupy the field of regulation in this area in such a broad manner that the Federal Supremacy Clause of the Constitution, Article VI and the Constitutional principal of "freedom of association" guaranteed by the First Amendments, "meaningful access to the courts" (irrespective of the Constitutional source of that right), and the Fourteenth Amendment's guarantee of equal protection individually or in conjunction prohibit their unreasonable proscription, at least under the injured seaman's civil adjudicatory remedy that Congress proscribed (if not for all injury victims generally). See *Railroad Trainmen*, supra. See also *Hoffman-LaRoche Inc. v. Sperling*, 493 US 165 (1989).

II. Analysis

A. In The Era of the Jones Act

One of the earliest codes of ethical standards in this country describes the ethical propriety of

humanitarian loans to the indigent.[8] But as described by Wolfram, *Modern Legal Ethics* (1996) pg. 53-56, the concept of a "national" attorney ethical code did not even evolve in the United States until after the turn of the 19th Century. Prior to that time only ten states had ethical codes derived from the Alabama's 1887 Code of Ethics. Concurrent with these Codes there also existed in several states vestiges of the common law crimes of champerty and maintenance. Id., at 489.[9] These

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[8] Hoffman's Fifty Resolutions Regarding Personal Deportment (1836) by David Hoffman of the Baltimore Bar for the guidance of young practitioners. Reproduced in Drinker's "Legal Ethics" (Columbia Press, 1953) pp. 338-351, Hoffman's Resolution XXIV Id. pg. 343-344 (Apx. L pg. 10-11) deserves to be read in its entirety as he painstakingly sets out the (historically) proper relationship between contingent fees and loans. It provides in significant part:

> *"Should his wants be pressing, it will be an act of humanity to relieve them myself, if I am able, and if I am not, then to induce others to do so.* ***
>
> *
>
> *Were this denied to the poor man, he could neither prosecute nor defend."* [emphasis added]

[9] 6 Cyclopedia L & Proc. *Champerty & Maintenance* pg. 865 (1903); 1 Corpus Juris (1918) *Champerty & Maintenance*, §27 Fn. 32[c] citing *Johnson v. Great Northern*, 151 NW 125 (Mn., 1913), and §36 (1917), 6 Corpus Juris, *Attorney & Client* §316 (1916).

Professor Wolfram describes as "...the law still groping its way toward a grudging acceptance of contingent fees." Id., at 497.

An analysis of the decisions of this court of that era reflect that it was willing to enforce these state law restrictions when applied to state law claims; *Peck v. Heurich*, 167 US 624, 629-632 (1897). But it held them inapplicable to federal law claims. *Stanton et. al. v. Embry*, 93 US 548, 556 (1877); *Taylor v. Bemiss*, 110 US 42 (1884). See also *Wylie v. Coxe*, 56 US 415, 418 (1853); *Wright v. Tebbitts*, 91 US 252, 254 (1875).

Wolfram at pg. 527 fn. 10, describes that as the ABA's September 1908 convention approached, even state controversies regarding contingency fees were dissipating and this fee structure generally accepted. Compare *Reece v. Kyle*, 21 NE 747 (Oh., 1892).[10] And Wolfram asserts this controversy was largely resolved by their acceptance in ABA's 1908 Cannon 13. Id., at 527. But as Wolfram also admits, the argument over this issue was heated and the rule that emerged only approved of the practice "under the supervision of the court in order that the client be protected from unjust charges". Id., at 527 fn. 12. And in fact the final report of the ABA Ethic's Committee reflects this issue was not fully resolved. See XXXIII ABA (1908) Report pg. 571. Wolfram also admits that

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[10] But see Sharswood's *Ethics* (5th Ed. 1884) reprinted in a separate Vol. XXXII to the 1907 Reports of the ABA pg. 61-64 and pg. 155-164.

even after the 1908 Cannons, the legitimacy of the contingent fee remained "guarded and controversial." Id. at pg. 527-528.

Moreover as described by Wolfram at pg. 54 fn. 23, in 1908, although the ABA comprised only 3% of the American Bar, it was powerful and admission to its membership was elitist.[11] Given the then pending ABA controversy over contingent fees, it's doubtful Congress in May, 1908 could have anticipated the full extent of the coming September 1908 storm upon the complex paramount federal legal regime it was debating in FELA. But Congress did provide for concurrent federal and state jurisdiction. 45 USCA §56. And it had to know that the attorneys would be necessary to prosecute the new rights it sought to establish. So sensing an ill wind, it provided the broadest prohibition to shelter FELA trainmen from all manner of bad weather. See 45 USCA §55; and *Phila., Balt., & Wash. RR v. Schubert*, 224 US 603, 609 (1912); *Duncan v. Thompson*, 315 US 1 (1941; *Boyd v. Grand Trunk Western RR*, 338 US 263 (1949).

The related remnant of controversy over human-

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[11] See also "*Proceedings in the Supreme Court of the United States in Memory of Justice Marshall*", 510 US pg. XVIII (1993).

itarian loans[12] was also resolved with no discernable debate, and no suggestion of a prohibition in 1908 ABA Cannon 15 addressing "How far a lawyer may go in supporting a client's cause", or any other cannon. See Wolfram at 527 Fn. 12.

Wolfram Id. pg. 50-64, describes that following the adoption of the cannons in thirty-one states by 1914, a "semblance" of unanimity on ethics may have been discernable, but as he describes, it was Lilliputian. Moreover that semblance should have given Congress no cause for concern as the 1908 cannons merely confirmed this court's mid-19th Century decisions governing proper attorney conduct in federal law actions.

And most significantly when the issue of humanitarian loans to trainmen prosecuting actions under FELA first arose before a state court in *Johnson*, supra, that court convincingly approved of them,

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[12] Compare Sharswood's *Ethics*, supra pg. 80-81 (Fn. 1) describing no impediment to advancing an out-of-state business client's bond, with his condemnation of contingent fees (even for the poor man), adding:

> "A lawyer should avoid, as far as possible, all transactions of business with his clients... He should avoid standing toward them in the relationship of a borrower or lender. A young lawyer should especially avoid borrowing of anyone." Id., at 164.

Compare Alabama Code of Ethics §38, reprinted XXXI (1907) Report of the ABA pg. 704 with Hoffman's *Fifty Resolutions* XXIV also reprinted Id., at 724 in a compendium of clearly very divergent ethical view for consideration at the upcoming 1908 meeting.

treating the matter as a straight-forward original issue of public policy with no suggestion of an ABA ethical or state law prohibition. Not four years later, *Mytton v. Missouri RR*, 211 SW 111 (Mo., 1919) came to the same conclusion in the same manner in another FELA case. See also *Northwestern SS Co. v. Cochran*, 191 F 146, 152 (9th Cir., 1911).

It is also notable that these decisions occurred during a period when Congress was actively being informed of the experiences trainmen were having with recoveries under the 1908 FELA, *as interpreted by intermediate appellate courts*, and actively correcting those deficiencies. *St. Louis & Iron Mtn. Rwy v. Craft*, 237 US 648, 659 (1915).

When Congress enacted the Jones Act, 46 USCA §688 in 1920, adopting FELA virtually wholesale by reference, the formative 1908 Cannons were still not remotely universally accepted and still silent as to the impropriety of humanitarian loans. On the contrary, *Johnson* and *Mytton* demonstrated that with respect to FELA workmen this practice was both common and to that point uniformly approved.[13]

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[13] This is most significant because as this court recently recognized in *American Dredging Co. v. Miller*, 510 US 443, 456 (1994):

> "The Jones Act adopts 'the entire judicially developed doctrine of liability' under the [FELA]."

and more particularly the 'uniformity requirement' of

(continued...)

Not until 1928 were the ABA Cannons amended to add Cannon 42. That cannon made it clear *for the first time* that a lawyer was ethically prohibited from *personally* bearing the "expenses of litigation", but also provided that *he could advance them* subject to reimbursement by the client. But the 53 *Reports of the ABA* (1928) pg. 119-131, 495, 780 reflect the term "expenses of litigation" was neither debated or defined. Nor were "living expenses" to clients in any manner addressed. On the contrary the language of the rule suggests that "advances" (i.e., loans) are proper as long as the client was ultimately responsible for them (i.e., the proposition urged here). And in the next FELA case to challenge the propriety of humanitarian loans (the entire court) agreed; see *People ex. rel. Chicago Bar Assoc. v. McCallum*, 173 NE 827, 831 (Ill., 1930). See also *Hildebrand v. State Bar*, 117 P.2d. 860 (Cal., 1941).[14]

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[13](...continued)
FELA, requiring state courts to apply a uniform federal law. This contemporary historical evidence expressed by the highest state courts of appeals in two respected jurisdictions in FELA cases (and subsequent history) are very relevant to the determination of Congressional intent. *Hagan v. Utah*, 510 US 399, 415-419 (1994).

[14] And *Grievance Committee of Fairfield Bar v. Hevas*, 96 A.2d. 802, 805 (Conn., 1953); and *Mack v. Higgins*, 121 NE.2d. 865, 871 (Ill., 1954). Compare *Hildebrand v. State Bar*, 225 P.2d. 508 (Cal. en banc, 1950). See also description in *Dombey Tyler Richards*
(continued...)

On the contrary awareness of the crying need for FELA workers to receive financial aid for living expenses during their inevitable "straitened circumstances" immediately following their accidents was illustrated by *Schubert*, *Duncan,* and the numerous lower court decisions cited in those cases. They illustrated how (despite FELA) railways exploited these workmen's straitened circumstances (which their negligence created) and the breadth of the Congressional protection in 46 USCA §55.

Despite these clear holdings, the railroads persisted in their exploitive practice until at least *Boyd* when the idea that any leverage they might hope to obtain by doing so was clearly destroyed. But just as *Boyd* conclusively established, railroads could gain nothing by lending funds to their injured trainmen, it must have simultaneously re-invigorated their efforts begun in *Johnson* to also see they not receive loans from their lawyers. Compare *Ricketts v. Penn. RR*, 153 F.2d. 757, 768 (2nd Cir., 1946, Frank J concur).

B. A Coming Change

The foregoing analysis of the state of legal ethics through the mid-1950's is confirmed by the contemporary conclusion of the longstanding chairman of the ABA's Standing Ethics Committee, that an attorney "may loan money to a client but not as a

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[14](...continued)
& Grier v. Detroit T&I RR Co., 351 F.2d. 121, 131 (6th Cir., 1965), and *In Re.: Ruffalo*, 370 F.2d. 447, 461 (6th Cir., 1966), Edward J dissenting.

regular practice", Drinker, *Legal Ethics* (Columbia University Press, 1953), see "forward" and pg. 95.

What then changed to prompt the ABA Ethics Committee to unequivocally declare otherwise in its unauthoritative advisory Ethics Opinion No. 288; see 41 ABA Journal 33 (Jan., 1955)?[15] Looking at this issue today without the prospective of the then developing chasm in the plaintiff's and defense's personal injury bar in this post-war era of invigorated concern for safe working conditions and stronger unionism, one might be at a loss. But the immediate authoritative response by National Association of Claimants Compensation Counsel (NACCA) president (and former governor of Kansas) Payne H Ratner, *Advancing Money to Clients -- Whether Unethical*, 15 NACCA Law Journal 410 (May, 1955), adds more than a clue. By 1955 NACCA (soon to become ATLA) was comprised of a large group of compensation attorneys at war with an ABA, that neither spoke for their ethical views or for the fundamental interests of their injured clients. Compare *In Re.: Sizer*, 267 SW 2d. 922, 924 (Mo., 1924).

And well after ABA Ethics Opinion No. 288, courts continued to approve of the practice of humanitarian loans. See *State v. Dawson*, 111 So.2d

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[15] Noticeably during 1953-1955 Mr. Drinker had stepped down as ABA Ethics Committee chairman, presumably to write his very authoritative treatise (published under the auspices of a venerable ethical foundation); see *3 ABA Opinions of Professional Ethics* (1967) pg. 4. Compare Op. No. 259; Id. at 580?

427 (Fla., 1959); and *In Re.: Moore*, 134 NE.2d 324, 328 (Ill., 1956). See also Note, *Attorney & Client, Advancements to Clients Not Solicitation Where Attorney's Motive is Proper*, 6 DePaul LR 148 (1956).

The first modern case to condemn the practice is *El Jenny v. Cleveland Tankers Inc.*, 209 F.Supp 91 (N.D. Ind., 1962). This was closely followed in a tortured construction of 1908 ABA Cannons 10 and 42 by *Mahoning County Bar Assoc. v. Ruffalo*, 199 NE.2d 396, cert den 379 US 931 (1964).[16]

But as *Ruffalo* was being dragged through his disbarment proceeding, the issue of client financial aid in connection with solicitation (as opposed to true humanitarian loans) was simultaneously coming before the Virginia Supreme Court in *NAACP v. Harrison*, 116 SE.2d 55, 70-72 (Va., 1960), and this court in *NAACP v. Button*, 371 US 415 (1963); see particularly Harlan J dissenting at 458-465; and then *Trainmen (1964)*, supra. *Harrison*, *Button*, and *Trainmen* sustained organization claims attacking "ethical" prohibitions to programs involving attorneys that clearly made humanitarian loans and held that such ethical prohibitions denied

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[16] A petition brought by Charles Alan Wright, Professor (later Emeritus) University of Texas, and eventually to become president of the American Law Institute and *Ex Officio* advisor to the ALI's counsel on the Restatement of the Law, 3rd, *The Law Governing Lawyers, Proposed Final Draft No. 1.* pg. ii-vii, Professor Wright would continue to represent attorney *Ruffalo* throughout his tortured course (discussed infra).

an indigent rights guaranteed under the First and Fourteenth Amendments. More to the point *Trainmen* specifically held that:

> "A State may not, by invoking the power to regulate the professional conduct of attorneys *infringe in any way the right of individuals* and the public *to be fairly represented in lawsuits authorized by Congress* to effectuate a basic public interest...
> [italics added]

Ruffalo's petition coming as it did immediately after *Trainmen* and involving the presence of other (apparently unprotected) violations initially failed to attract the attention of this court. Undaunted his counsel contested the application of his state court disbarment in federal court. *In Re.: Ruffalo*, 249 F. Supp. 432 (N.D. Ohio, 1965). Once there it became clear that (as in other disbarment proceedings surrounding *Trainmen*), railroads had enlisted the aide of the various Bars to assert them in condemning the formerly common ethical practice of humanitarian loans. *Ruffalo* Id. at 437-438 felt this blatant effort by the railroads in their own economic self-interests denied FELA workers their rights under *Trainmen*.

Following this revelation *Ruffalo* did attract this Court's attention, and the semblance of a just result was achieved. *In Re. Ruffalo*, 390 US 544 (1968). Although the issue of humanitarian loans was also put forth in Professor Wright's second petition for certiorari, the case's procedural posture

seems to have precluded this court's consideration of this issue; see 370 F.2d. 477, 450 (1965). *Ruffalo* nevertheless did spark a great deal of renewed judicial and scholarly discussion.[17]

Yet another series of holdings in *United Mine Workers v. Illinois Bar Assoc.*, 389 US 217 (1967) and *United Transportation Union v. Michigan Bar*, 401 US 576 (1971), were to be required to presumably resolve this issue.[18]

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[17] See *Ruffalo*, supra (Edwards J. dissent); *Dombey*, supra (Smith J. concurring in result); Sims, *Advancement to Clients by Attorneys*, 17 Alabama LR 313 (1965); Anno., *Validity and Propriety of Arrangements of Which Attorneys Pay of Advance Expenses of Clients* 8 ALR 3rd 1155, 1176 ¶6 (1966); Strelon, *Loans to Clients* 55 Cal. LR 1419 (1967), all supportive of the ethical propriety of humanitarian loans and critical that any prohibition would violate this court's holding in *Trainmen*. Notably during this period Paine Ratner, the author of the scholarly 1955 article in the NACCA Law Reporter that dared challenge ABA Ethics Opinion 288, was also coming under attack for this practice as well. *In Re.: Ratner*, 399 P.2d. 865 (Kan., 1965). Ratner was acquitted upon an independent finding by the Kansas Supreme Court that such loans were simply not unethical, and it was persuaded by this court's opinion in *Trainmen* to order his acquittal on related charges of solicitation as well.

[18] Compare Justice Harlan's dissent in *Button* at 463-465 noting *Harrison* continued to permit the NAACP to "contribute to those who need assistance". In *United Transportation* at 597 he raised the issue again, observing that the Union had been enjoined from

(continued...)

Unfortunately as *United Transportation* reflects, state bars refused to accept *Trainmen* (and *United Mine Workers*). See *Dombey* supra at 131-138 (Talbot J. concur); *Ruffalo*, supra; Smith, *Cannon 2*, 48 Tex. L.R. 285, 301 (1970); Nahstoll, *Group Legal Services* 48 Tex. L.R. 334 (1970). On the contrary despite the call for change from numerous educators and practitioners alike (and a new format), many of the constraints that this Court expressly prohibited (and certainly forewarned of)

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[18](...continued)
mentioning the attorneys they recommended to their membership would "defray expenses or make advances", this "close" issue which prompted him to note:

> "It is not generally improper for an attorney to make advances to clients; it is considered improper for him to use the fact that he makes them as a drawing card."

The majority did not see it as close, stating that the "common thread" from *Button* to *Mine Workers* was that the activity undertaken was done to obtain "meaningful access to the courts" which it found to be "a fundamental right within the protection of the First Amendment" and of "the rights Congress gave [in FELA]". This Court held this would be a "hollow promise" if a court (enforcing its state's ethical rules) could deny "the means of enabling" trainmen the means "to meet the cost of legal representation". This Court then addressed the injunction regarding attorney loans and held it "..invalid for the same reason the provision limiting fees is invalid". Id at 585 fn. 9. See also analysis in Cheatam, *The Reach of Federal Action Over the Practice of Law*, 18 Stanford LR 1288, 1293-1294 (1966).

in *Burton* and *Trainmen* persisted in its new "1969 Cannons".

Of relevance here is DR 5-103(B) which despite the pre-Code split of authority on the subject, strongly suggested humanitarian loans are prohibited; Wolfram Id at 508-509. But as conceded by the revisor and chief ethical advisor[19] to the Wright Committee that drafted it, Texas University Professor Sutton, *How Vulnerable is the Code*, 57 N Carolina L.R. 497, 498 fn. 6 (1979):

> "DR 5-103(B) forbids the lawyer to advance or guarantee financial assistance to the client with certain exceptions, and it probably has served to cause clients represented by ethical lawyers to accept out of economic necessity, unduly low settlement sums."

As further noted by Sutton, Id., with little adverse comment, Texas refused to adopt DR 5-103(B). Then *Louisiana St. Bar Ass'n v. Edwins*, 329 So. 2d 437 (La. 1976), held that any construction prohibiting post-retention humanitarian loans would violate *Trainmen*.

As Wolfram, supra, describes at pg. 56-60, the 1969 Code proved "more controversial and less stable than the 1908 Cannons". Nevertheless most state bars proceeded to adopt the Code including DR 5-103(B), although there were num-

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[19] See Armstrong, *The ABA Code of Professional Responsibility, Some Personal Reflections*, 23 Baylor L.R. 679 (1972).

erous state variations. Another call for revision to the 1969 Code resulted in the prestigious Kutak Commission proposing a new Code (the MPC). Its (draft) MPC 1.8 permitted humanitarian loans.[20] But the ABA House of Delegates rejected it, and such advances "were once again prohibited altogether"![21] *Taylor* (Fla., 1994), supra, recently rejected that interpretation of MPC 1.8(e). But as *KAH* at Apx. A-8 describes, the remainder of courts in the wake of DR 5-103(B) and MPC 1.8(e), have not. See *Attorney HH*, supra (Miss., 1995), and cases cited[22]

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[20] Apx. L pg. 14. As described at Wolfram, supra at 60-62, ATLA also made a "frontal assault" on the MPC. See Roscoe Pound Foundation §5.6 which also permits humanitarian loans (see Apx. L pg. 14-15).

[21] *KAH* at Apx. A-6. See also Clark, *Fear and Loathing in New Orleans, the Sorry Fate of the Kutak Commission's Rules*, 17 Suffox Univ. L.R. 19; and Giller, *What we Talked About When We Talked About Ethics*", 46 Ohio State L.J. 243, 245 (1985).

[22] Despite an increasing number of dissents, like that of Justices Lee and McRae in *HH*, premised on the denial of access to courts found in *Edwins*, or the entire gamut of constitutional guarantees identified by Justice Kauger in *Smolen*, supra (Ok., 1992). As also described in *Smolen* at 905, *Restatement (3d) Tentative Draft No. 4 Governing Lawyers* (1991) §48 pg. 224-231, similarly proposed humanitarian loans, noting that none of the grounds in support of the MPC's general ban were persuasive. However *Restatement, Proposed Final Draft No. 1* §48 pg. 179-186 (1996), reveals the

(continued...)

Finally as *KAH* Apx. A-15 fn. 41 notes, eight jurisdictions have rules permitting humanitarian loans under the circumstances here (i.e., after the contract of retention), and numerous modern commentators criticize the general prohibition.[23]

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[22](...continued)
ALI has since been persuaded to recommend an absolute prohibition (with an alternative for post-retention humanitarian loans in brackets). And therein explains why more challenges have not been mounted before now. There has been a "hope" since 1969 that the rule would be revised by the ABA (or the courts ala *Edwins* and *Taylor*); the sums involved are modest to the lender, the prohibited activity hard to detect, and when detected, the penalty (for this infraction alone) has been modest. But see *Dawson* supra. Many, many (ethical) attorneys have just (of necessity) silently evaded the rule, and when detected, just accepted the reprimand. Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 Fordham LR 1307 (1998) and *Shea v. Virginia State Bar*, 374 SE 2d. 63 (Va., 1988); *Florida Bar v. Hastings*, 523 So.2d 571 (Fla., 1988); *Cleveland Bar Ass'n v. Minoff*, 652 NE.2d. 968 (Ohio, 1995); *In Re.: Berland*, 328 A.2d. 471 (Pa., 1974). But it's *not* right.

[23] Koval, *Living Expenses, Litigation Expenses, and Lending Money to Clients* 7 Georgetown Jour. of Legal Ethics 1117 (1994); Garrett, *Lending a Helping Hand* 16 U. Dayton L.R. 221, 246 (1990); Vassen, *The Case for Allowing Lawyers to Advance Client Living Expenses*, 80 Ill. B.J. 16 (1992). Edington, *Ethics at Sea*, 70 Tulane LR 415, 466 (1995).

C. MODERNLY

Any remote doubt as to the present state of the law should be foreclosed by *Bates*, supra at 376 fn. 32.[24] See also *Zauderer*, supra; and *Shapero*, supra. Nothing in the correct decision of *Ohralik v. Ohio State Bar*, 436 US 447 (1978) detracts from this principal under the circumstances here. *Ohralik* involved solicitation, but this case most certainly does not. See *KAH* Apx. A pg. 2-4.

Nor does this case involve a non-adversarial federal administrative proceedings in which *Congress proscribed* an attorney-client relationship at odds with a *state* ethical ruling, see *Triplett*, supra[25] relied upon by the Alaska Bar Ass'n below. On the contrary this case presents just the reverse of *Triplett*. *KAH* seeks the enforcement of federal statutory principals permitting an attorney-client relationship (i.e., a humanitarian loan) *denied*

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[24] Where this court described *Burton*, *Trainmen*, *Mine Workers*, and *United Transportation* by stating:

> "It would be difficult to understand these cases if a lawsuit were somehow viewed as an evil in itself. Underlying them was the court's concern that the aggrieved receive information regarding their legal rights, *and the means of effectuating them*. This concern *applies with at least as much force to aggrieved individuals* as it does to groups. [italics added]

[25] Compare similar Alaska Supreme Court machinations to a similar federal scheme in *Vitale v. Tabbytite*, 942 P.2d. 1141 (Ak., 1997).

by a state ethics rule.[26] Nor does the seamen's complex Jones Act and maritime remedy provide any "meaningful alternatives" to litigation which persuaded *Walters v. Nat. Ass'n of Radiation Survivors*, 473 US 305, 334-35 (1984), not to extend *Trainmen* to that situation.

Perhaps the best response to the Alaska Bar's argument below is found in *Triplett*'s citation at 720 to *Caplin & Drysdale v. United States*, 491 US 617, 632-633 (1989).[27] Compare *Nix v. Whiteside*, 475 US 157 (1985); *Phillips v. Washington*

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[26] Nor is *MLB v. SBL*, 519 US 102 (1996) relied upon by the Alaska Supreme Court remotely relevant to this claim. This deceased seaman's dependent sought no fee waiver or anything else "free" from the State of Alaska (or anyone?) She sought both the advance of litigation "costs" and humanitarian loans from her lawyer and now that she has been successful in her litigation and has funds, she seeks that he be repaid. *MLB* is simply distinguishable. It is short-sighted to suggest that because ARPC 1.8(e)(2) expressly permits counsel to pay litigation "costs" (thereby opening the courts doors), that indigents have any more access to justice, if inevitably before their case can come to court (and usually before it's even filed) they must unfairly compromise it in order to eat?

[27] Wherein this Court stated at fn. 10:

> "The fact that a federal statutory scheme authorizing contingency fees -- again, if that is what Congress has created in §853 (a premise we doubt) - is at odds with model disciplinary rules or state disciplinary codes *hardly renders the federal statute invalid.*" [italics added]

Legal Foundation, __ US __, 118 S.Ct. 1925 (1998)[28]

In the final analysis this court need really only address its recent decision in *Yamaha Motor Corp. v. Calhoun*, 516 US 199 (1996) and *Miller*, supra (1994), regarding permissible state interference in maritime matters. Recognizing as it did in *Miller* at 452 that the line is not readily discernible in supreme court admiralty jurisprudence, *Yamaha* at 210 fn. 8 stepped well back to an area that is clearly beyond where states may permissibly tread and drew a line in the sand (previously drawn before). When Congress proscribes a comprehensive tort regime to be uniformly applied to "seafarers", this court has recognized virtually no manner of state modification to their damages. Id., at 215. See also *Pope & Talbot Inc. v. Hawn*, 346 US 406 (1953) and *Miller* at 453.

Miller at 453 also reaffirms that the regulation of "Procedure" is within a state's power when a maritime claim is brought in a state forum (but maritime substantive law generally is not). *Miller* further warned to beware the use of "labels" in that

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[28] Were this court to hold otherwise a state could suppress a congressionally mandated remedy by the simple expedient of restricting a litigant's attorney's relationship with his client in such a fashion that it practically could not be enforced. Compare *Evans v. Jeff D.*, 475 US 717, with 765-766 (1985, Brennen J. dissenting), wherein in defiance of the opinion of the majority of this court on a similar issue he actively urged bar associations issue rules doing just that?

regard. Compare Id. at 454, with 457-58 (Souter J. concurring). *Hughes v. Foster Wheeler Co.*, 932 P.2d. 784, 790 (Ak., 1997).

There are some that would take great meaning from a few phrases in *Miller* to extend it to the breaking point.[29] They then add a selective tabulation of cases and discern a "trend" upholding state laws.[30] Whatever this Court's "trend", *Hughes* stretched *Miller* and *Yamaha* beyond it by holding thirty seamen who filed suit pre-*Miller* but then were unsuccessful in defeating post-*Miller* motions forum *non conveniens*, jointly and severally liable for almost $135,000 in "Alaska Rule" attorneys fees. Though reargued at length below (Apx. J pg. 12), Hughes was but a reaffirmation of a long held view; *Williams v. Eckert*, 643 P.2d. 991 (Ak., 1982). *KAH* chose to subsume its response to all petitioners' federal supremacy and constitutional arguments by attempting to limit *Trainmen* and *United Transportation* to "collective activity". *KAH* Apx. A pg. 11-14; Apx. C; Apx. B.

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[29] See Robertson, *Displacement of State Law by Federal Maritime Law*, 26 Jour. of Mar. Law & Comm. 325 (1995); Robertson, *Court-Awarded Attorney's Fees in Maritime Cases: The "American Rule in Admiralty"*, 27 Jour. of Mrt. Law & Comm. 507 (1996).

[30] See Robertson, *The Applicability of State Law in Maritime Cases after Yamaha*, 21 Tul. Mar. Law Jour. 81, 96 (1996). But see *Carnival Cruise Lines Inc. v. Shute*, 499 US 585 (1991), and *Carnival Cruise Lines v. Superior Court*, 499 US 972 (1991).

But *Hughes* was the unseen anchor below the surface, holding this seaman's claim down.

Regardless of the unstated methodology actually applied by Justice Scalia in *Miller* at 454, it must be clear that ethical prohibitions to humanitarian loans are not "procedural" despite their label. This prohibition has nothing to do with how courts go about adjudicating substantive rights; hence it has nothing to do with process. On the contrary as this case illustrates the need for a humanitarian loan arises whenever the absence of the seaman's earnings (occasioned by the accident) cause his savings and conventional credit to run out. This typically occurs during the investigatory stage, long before the best court in which to file his case is even determinable. See *KAH* Apx. A pg. 2-3.

Conversely this prohibition *does* bear heavily upon the substantive right to recover. The inability of a victim or his family to meet necessities will dictate that the most deserving case be settled by those needs, and not substantive merits. See *KAH* Apx. A pg. 14-16; Apx. E pg. 2-3 ¶5-6; Apx. J pg. 1. Nor are there a multifariousness of factors relevant to the application of MPC 1.8(e). The seaman's post-accident "straitened" circumstances will "predictably" determine outcome.

For this reason as well it can easily be said this rule is relied upon by "maritime actors" in decisions about primary conduct: "how to manage their business and what precautions to take". Ship owners will rely on this prohibition in their choice of where to do business and what level of safety to

employ. Why be safe in Alaska? If an accident occurs, compensation will be largely driven by the seaman's financial ability to "hold out" (i.e., nil). Similarly injured seamen will be driven at least in their secondary conduct to seek attorneys admitted in states (such as Louisiana) having ethical rules that permit humanitarian loans (which not coincidentally also have "open forums" ala *Miller*).

Such a force violates the mandate of Congress in 45 USCA §56, that the seamen have multiple choices of forum (and consideration of judicial economy recognized in *Miller*). Not the least of these choices should be his residence or where the accident occurred. And what is to become of his cause if post loan his forum of first filing dismisses his suit forum *non conveniens*?

As with *Miller* at 455, this court too should turn to the Jones Act for confirmation of these principals. Lower courts have held that 45 USCA §60 precludes the application of state ethical rules to protect an attorney including his pre-litigation accident investigation when otherwise a myriad of possible state ethical rules might proscribe his conduct.[31] Similarly MPC 1.8(e) amounts to a

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[31] See *Norfolk Southern Railway Co. v. Thompson*, 430 SE 2d 371 (Ga., 1993); *Hendley v. Central of Georgia R. Co.*, 609 F.2d. 1146 (5th Cir., 1980); *Sheet Metal Workers Intern. v. Burlington*, 736 F.2d 1250 (8th Cir., 1984); *Tucker v. Norfolk Railway Co.*, 849 F.Supp. 1096 (E.D. Va., 1994); compare *Stack v. Chicago M. St. P&P R. Co.*, 615 P.2d 457 (Wa. 1980).

"rule" or "device" exempting employers from liability in violation of 45 USCA §55. Compare *Boyd*, supra.[32] It also runs afoul of the "entire comprehensive tort regime" adopted in the Jones Act to supplement the injured seaman's remedy under paramount maritime general law. *Yamaha* at 628.

In resolving this case this court may also return to *Bates* and its application which divided this Court in *Went For It*. But it does not *have* to do so.[33] The issue *KAH* presents predates *Bates* and is *much* more limited. It is rather that *Trainmen* establishes that there exists in the United States

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[32] Compare also *Boccardo v. CIR*, 56 F.3d. 1016, 1019 (9th Cir., 1995), and *Rand*, supra at 600, suggesting that state ethical law will cause federal court cases "to be driven, henceforth by state law" as well. Compare *Miller* at 454 fn. 4. Given the uniformity of federal court adoption of their state's ethics rules, this concern is far greater here. Nor is this a novel view of the MPC 1.8(e) under the circumstances here. See *Hastings*, supra at 572.

[33] Compare this court's response to Amicus in *Miller* at 457. If this court (or some of its members) wish to dispose of this case under the Jones Act or its Article III §2 jurisdiction and the Supremacy Clause, this Court's opinion will nevertheless lend great weight to then (arguable) "policy" considerations facing states in the inevitable future debate over humanitarian loans. See their alternatives presented in the Restatement 3rd *Governing Lawyers*, §48 (final), supra. Justice Stevens' criticism of *Southern Pacific Co. v. Jensen*, 244 US 205 (1917) in *Miller*, supra at pg. 458 aside, therein lies *Jensen*'s great legacy to "our federalism".

Constitution a right to "petition the courts for redress of grievances", *granted under an act of Congress*, which may not be infringed by a state invoking its power to regulate the professional conduct of its Bar while representing victims' holding these federal rights (irrespective of where these litigants *eventually* determine their cause may be best prosecuted).

The holding of *Trainmen* being beyond dispute, the only other question remains whether Alaska can ever establish any basis for its ARPC (MPC) 1.8(e) universal prohibition to all humanitarian loans applicable to *all* causes of action, as was unsuccessfully attempted in *Bates* and successfully established in *Went For It*? But when called upon to justify its purpose, the Alaska Supreme Court found:

> "The Bar Association concedes that the prohibition may not be justified and that modification of the rule may be in order." (*KAH* Apx. A pg. 16)

Accordingly whatever showing this Court wishes to require of an ethical rule that severely impedes seamen's rights under an Act of Congress in the wake of *Went For It* (which only addressed state bar regulations that interfered with state law causes), Alaska cannot be said to have met it here. Solicitation is already properly prohibited under *Ohralik*. And unlike the "bait" that persuaded Justice O'Connor in *Zauderer* at 678, in a *post*-retention loan the attorney isn't even "fishing". This case doesn't involve advertisements offering

to make loans. And it doesn't involve loan for profit.

Nor may it be said that an attorney's post-retention humanitarian loan to aid a client to withstand the pressures to unfairly settle brought on by the inevitable delays of litigation (or worse, by his alleged tort feasor), reflects unfavorably on the *profession* of law. On the contrary this act is in furtherance of the highest ideals of our profession in aiding an indigent receive justice, a foundation stone in every attorney's ethical code. In short MPC 1.8(e) is simply over broad. *Bates, Zauderer, Shapero, Went For It.*

CONCLUSION

This Court should note probable jurisdiction and grant certiorari to review the Alaska Supreme Court's decision in *KAH*.

Respectfully Submitted this 22 day of May, 1999.

Gerald W. Markham
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APPENDIX Directory

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APPENDIX A

In The Matter Of
The Minor Child KAH
d.o.b. 9/21/85

Alaska Supreme Court No. S-7761
Alaska Superior Court Nos.
3KO-93-45/55 PR
Opinion No. 5049 - November 27, 1998

OPINION

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Kodiak
Joan M. Woodward, Judge.

Appearances: Gerald W. Markham, Kodiak, for Appellant. Robert H. Wagstaff, Anchorage, Richard D. Hailey, President, Association of Trial Lawyers of America, and Jeffrey R. White, Associate General Counsel, Association of Trial Lawyers of America, Washington, D.C., for Amicus Curiae the Association of Trial Lawyers of America. Stephen J. Van Goor, Bar Counsel, Alaska Bar Association, Anchorage, for Amicus Curiae Alaska Bar Association.

Before: Matthews, Chief Justice, Compton, Eastaugh, Fabe, and Bryner, Justices.

FABE, Justice.

I. INTRODUCTION

Alaska Rule of Professional Conduct 1.8(e) prohibits lawyers from providing clients with financial assistance other than court costs and expenses of litigation.

Gerald W. Markham, counsel in a wrongful death suit, advanced his client funds for living expenses and, following in a wrongful death suit, advanced his client funds for living expenses and, following settlement of the case, sought reimbursement from the settlement funds. The superior court denied this request. Markham appeals, arguing that the loans were permissible under Rule 1.8(e), or, if not permissible, that the rule unconstitutionally denies or infringes upon access to the courts. Because we conclude that Rule 1.8(e) prohibits lawyers from advancing living expenses to clients and does not unconstitutionally interfere with court access, we affirm.

II. FACTS AND PROCEEDINGS

In 1993 P.K.H. was killed while working as a seaman on a commercial crabbing vessel in the Bering Sea. He left as his sole heir K.A.H., who was seven years old at the time. S.H., K.A.H.'s mother and P.K.H.'s former wife, was appointed as the personal representative of P.K.H.'s estate.

S.H., represented by Gerald W. Markham, filed a wrongful death action against P.K.H.'s employer under the federal Jones Act.[1] By 1994 S.H.'s financial situation was bleak. Markham arranged for an accountant, Andy Lundquist, to loan several hundred dollars to S.H. over the course of six months on the condition that S.H. and Markham would repay Lundquist from the proceeds of the wrongful death suit. Despite the loans, S.H. and her two daughters were evicted from their

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[1] 46 U.S.C. §688 (1975 & Supp. 1998).

residence and, according to Markham, were living in their car in the summer of 1994. After a brief move to Wisconsin to live with S.H.'s father, S.H. was advised by counsel that all hopes for pre-litigation settlement negotiations in the wrongful death case had ended and that S.H.'s presence in Alaska was needed to locate P.K.H.'s wage records and photographs, and to give her deposition. S.H. asked one of Markham's associates to loan her money for airfare from Wisconsin and rent for an apartment in Kodiak. The associate wired S.H. $5,025.

At some point in 1995, S.H. again sought a loan from Markham to "get her by". Markham asked Lundquist to make the loan, and Lundquist wrote a check for $1,000 to S.H. from Markham's account. Additionally, during the course of his representation, Markham advanced small amounts of money to S.H. for items such as "cigarettes and cosmetics". In sum, it appears that Markham's advances to S.H. and loans guaranteed by him totaled over $6,000: $5,025 in connection with S.H.'s return from Wisconsin, over $1,000 to defray ordinary costs of living, and several hundred dollars loaned by Lundquist and guaranteed by Markham.

The wrongful death suit was eventually settled in 1995 for $665,000. At a January 1996 hearing, the standing master approved Markham's one-third contingency fee of $216,692.63 and litigation costs of $15,012.10. But the court refused to allow use of settlement funds to reimburse Markham for the loans made to S.H. Markham moved for reconsideration, arguing that advances for living expenses should be allowed under Rule 1.8(e). In February 1996 the standing master recommended granting Markham an

additional $3,050 to reimburse him for costs. This amount represented the cost of airfare to fly S.H. and her daughters back from Wisconsin and other costs of litigation. Markham continued to argue that he was entitled to be reimbursed for the remainder of the loans. The court approved the standing master's recommendation and noted that counsel "should ask the Supreme Court to reexamine Professional Conduct Rule 1.8 if he finds it inappropriate. The court will not consider a challenge to the rule absent an adversary proceeding." Markham appeals the court's refusal to allow his reimbursement for his advances of living expenses to S.H.

Because there is no appellee in this matter, we asked the Alaska Bar Association to file an amicus curiae brief in response to Markham's arguments. The Association of Trial Lawyers of America (ATLA) also filed an amicus curiae brief. We thank them both for their valuable assistance.

III. DISCUSSION

A. Alaska Rule of Professional Conduct 1.8(e)

1. Standard of Review

The superior court concluded that Rule 1.8(e) prevented it from allowing Markham's reimbursement for humanitarian loans to S.H. Whether Rule 1.8(e) prohibits such loans presents a question of law. We review questions of law de novo.[2] "Our duty is to

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[2] See *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

adopt the rule of law that is most persuasive in light of precedent, reason, and policy."[3]

2. Rule 1.8(e) Prohibits Advances for Living Expenses

We must first decide whether Markham's advances to S.H. for living expenses were permissible under Alaska Rule of Professional Conduct 1.8(e). Interpretation of Rule 1.8(e) presents a question of first impression in Alaska. Markham asserts that the rule does not forbid an attorney from making loans for living expenses to a client after the attorney has been retained. The Alaska Bar Association responds that the plain language of Rule 1.8(e) expressly prohibits a lawyer from providing financial assistance to a client other than court costs and expenses of litigation.

The Model Rules of Professional Conduct were adopted by the American Bar Association in 1983.[4] We promulgated the Alaska Rules of Professional Conduct in 1993, rescinding the Code of Professional Responsibility in its entirety.[5] The Alaska rules adopt Model Rule 1.8(e) verbatim. Rule 1.8(e) states that a lawyer may not provide financial assistance to a client

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[3] Id.

[4] See American Bar Association, *Annotated Model Rules of Professional Conduct* vii (3d ed. 1996) (*Annotated Model Rules*).

[5] Alaska Supreme Court Order No. 1123 (April 14, 1993).

in connection with litigation other than to advance court costs and litigation expenses:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.[6]

The rule's language unambiguously forbids lawyers from advancing living expenses to clients. The overwhelming weight of authority on the subject supports this view. The Annotated Model Rules state unequivocally that "[t]he most common violation under Rule 1.8 and its Model Code counterpart occurs when a lawyer advances living expenses to a client while litigation is pending."[7] As *The Law of Lawyering* recounts, the American Bar Association House of Delegates rejected a proposed final draft of the model rules that would have allowed lawyers to advance client funds for living expenses under Rule 1.8(e), and such advances "were once again prohibited altogether."[8] And *Modern Legal Ethics* explains that the rules

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[6] Alaska R. Prof. Conduct 1.8(e).

[7] *Annotated Model Rules*, supra, at 130.

[8] 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 1.8:602, at 275 (2d ed. 1996 Supp.).

"implicitly but clearly" prohibit loans for living expenses, even in cases involving especially needed clients:

> The most common instance in which a lawyer might be asked by a client for assistance is an instance in which the prohibition rather clearly applies. That is when personal injury clients, both injured and possibly made impecunious by the defendants' tortious conduct, are unable to survive prolonged litigation without financial assistance. Defendants, aware of the economic pressure burdening unaided plaintiffs, have every economic incentive to prolong the litigation with frivolous motions and discovery. At least on their face, both the Code and the Model Rules prohibit assistance no matter how needful the client. And so have gone most of the decisions under the Code.[9]

Accordant with this position, the vast majority of courts interpreting Rule 1.8(e) and its precursor have concluded that lawyers are prohibited from advancing living expenses to clients.[10] Although the Supreme

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[9] Charles W. Wolfram, *5 Modern Legal Ethics* §9.2.3, at 509 (1986).

[10] See *Annotated Model Rules*, supra, at 130-31 (compiling cases); see also *Mississippi Bar v. Attorney HH*, 671 So.2d 1293, 1296-98 (Miss. 1995) (stating that the majority of courts have found that advancing living expenses "is violative of the Rules of Professional Conduct," and analyzing cases from Kentucky, Virginia, Oregon, South Carolina, and Arizona).

Courts of Louisiana and Florida have reached the opposite conclusion,[11] courts in other states have not adopted their reasoning,[12] and we find their analysis unpersuasive.

In consideration of the rule's clear ban on lawyers providing financial assistance to clients in connection with litigation, except in the circumstances set forth in subsections (1) and (2), and in light of the virtual consensus among courts and commentators, we hold that Rule 1.8(e) does not permit lawyers to advance living expenses to clients.

3. Rule 1.8(e) Does Not Unconstitutionally Deny or Impede Access to the Courts.

Markham next argues that Rule 1.8(e) unconstitutionally denies or interferes with a plaintiff's access to the courts to enforce federal rights under the Jones Act. In support of this argument, ATLA contends that the

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[11] See *Florida Bar v. Taylor*, 648 So.2d. 1190, 1192 (Fla. 1994); *Louisiana State Bar Ass'n v. Edwins*, 329 So.2d 437, 445 (La. 1976).

[12] See Michael R. Koval, Note, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 Geo. J. Legal Ethics 1117, 1133 (1994) (stating that "[t]the *Edwins* court... stands virtually alone in its interpretation of DR5-103(B)"); see also *Sims v. Selvage*, 499 So.2d 325, 328 n.1 (La. App. 1986) (noting that the *Edwins* interpretation "has created problems within the profession that override any benefit to the client," and suggesting reconsideration of whether lawyers should be allowed to advance living expenses to clients).

rule imposes financial hardship on plaintiffs that forces them to settle disputes rather than endure the potentially prolonged litigation process.

We recognized the general right of access to civil courts in *Bush v. Reid*.[13] In that case, based on due process and equal protection concerns, we invalidated a statute that precluded a person on parole from bringing a civil action.[14] Our analysis relied on *Boddie v. Connecticut*,[15] in which the United States Supreme Court held that indigents could not be deprived of access to divorce courts by the imposition of filing fees that they were unable to pay.[16] We again considered the right of access to the civil courts in *Patrick v. Lynden Transport, Inc.*[17] At issue was a statute requiring out-of-state plaintiffs to post a security bond for anticipated costs and attorney's fees as a condition of maintaining a suit in Alaska.[18] The "effect of the statute [was] to discriminate between those nonresidents who can afford to post a bond for costs and attorney fees and those nonresidents who cannot, as well as to discriminate between nonresidents and

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[13] 516 P.2d 1215, 1219-21 (Alaska 1973).

[14] See Id. at 1220-21.

[15] 401 U.S. 371 (1971).

[16] See Id., at 382-83.

[17] 765 P.2d 1375 (Alaska 1988).

[18] See Id., at 1376.

residents generally."[19] We concluded that the statute violated equal protection because it unreasonably restricted access to the courts.[20]

These cases are distinguishable from the case at hand. First, as we noted in *Patrick*, the holding in *Boddie* is narrow[21] -- the decision turned on the fundamental nature of marriage and the state's monopoly on the means for obtaining a divorce.[22] In a later decision, "the Court clarified that a constitutional requirement to waive court fees in civil cases is the

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[19] Id., at 1377.

[20] See Id., at 1380.

[21] See Id. at 1378. As the *Boddie* Court explained:

> [W]e wish to re-emphasize that we go no further than necessary to dispose of the case before us.... We do not decide that access for all individuals to the courts is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship [marriage].

401 US at 382-83.

[22] See 401 U.S. at 374.

exception, not the general rule."[23] The Supreme Court has further explained that it has "consistently set apart from the mine run of cases those involving state controls or intrusions on family relationships."[24] No such fundamental family concern is at stake in this case.

Second, whereas *Bush*, *Boddie*, and *Patrick* involved direct impediments to court access, this case does not. The statute in *Bush* flatly prohibited parolees from filing suit. The statutes in *Boddie* and *Patrick* imposed court fees that denied indigent plaintiffs access to the courts. Such fees have been characterized as "insurmountable barrier[s] to filing suit."[25] By contract, nothing in Rule 1.8(e) expressly permits a lawyer to pay the court costs and litigation expenses of indigent clients, presumably so that they will not be denied access to the courts due to their indigency. This provision squarely addresses the concerns expressed in the *Bush* and *Patrick* cases.

Markham and ATLA also rely on *Brotherhood of Railroad Trainmen v. Virginia*.[26] *Trainmen* is inapposite, however, because it dealt with First Amendment associational rights, which are not at issue here.

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[23] *M.L.B. v. S.L.J.*, 117 S.Ct. 555, 563 (1996) commenting on *United States v. Kras*, 409 US 434 (1973)).

[24] Id., at 563-64.

[25] *Roller v. Gunn*, 107 F.3d. 227, 232 n. 1 (4th Cir. 1997).

[26] 377 US 1 (1964).

In *Trainmen*, a union had a practice of advising injured members and their families to obtain legal advice before settling their claims.[27] The union also recommended particular lawyers to handle their cases.[28] As a result, legal employment was channeled to lawyers approved by the union.[29] The state bar association obtained an injunction to bar this practice.[30] The Supreme Court ruled in favor of the union, concluding that its activities were protected by the First Amendment right of association.[31] The Court explained that the state could neither interfere with these associational rights nor infringe upon the right to be fairly represented by counsel:

> A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, and for them to associate together to help one another to pre-

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[27] See Id., at 5.

[28] See Id.

[29] See Id.

[30] See Id., at 2.

[31] See Id., at 8.

> serve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics. The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights. The right to petition the courts cannot be so handicapped.[32]

Several years later, in *United Transportation Union v. State Bar of Michigan*,[33] the Court commented on its *Trainmen* decision, stating that "[w]e held in that case that the First Amendment guarantees of free speech, petition, and assembly give railroad workers the right to cooperate in helping and advising one another in asserting their rights under [federal law]." [34] The Court explained that the issue in *Trainmen* and related cases was "the basic right to group legal action," and the First Amendment protection of "collective activity undertaken to obtain meaningful access to the courts."[35] Rule 1.8(e) does not interfere with such rights. Furthermore, the rule does not bar plaintiffs from "resorting

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[32] Id., at 7 (citations omitted).

[33] 401 US 576 (1971).

[34] Id., at 578-79.

[35] Id., at 585.

to the courts to vindicate their legal rights."[36] To the contrary, as discussed above, Rule 1.8(e)(2) ensures that the courts are open to indigent plaintiffs.

We further note that neither Markham nor ATLA points to a single case in which a court has held that Rule 1.8(e) is unconstitutional, and our research uncovers none. Although Markham refers to *Louisiana State Bar Association v. Edwins*,[37] the *Edwins* court did not hold that the ban on advances for living expenses was unconstitutional. Rather, the *Edwins* court merely expressed some doubt as to the constitutionality of such rules.[38] Notably, the court referred to the Louisiana Constitution's express guarantee of "access to courts."[39] We conclude that Rule 1.8(e)'s ban on lawyers advancing living expenses to clients is not unconstitutional.

4. Policy Arguments

Markham and ATLA advance several policy arguments in favor of permitting lawyers to advance living expenses to clients. Foremost, they claim that the practice assures that indigent clients can withstand pressure to

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[36] *Trainmen*, 377 US at 7.

[37] 329 So.2d. 437 (La. 1976).

[38] See Id.

[39] Id.

settle their claims prematurely.[40] They further suggest that the concerns about allowing lawyers to make such loans can be addressed through less restrictive means than a blanket prohibition. To this end, they observe that several jurisdictions have modified their rules to allow for advances for living expenses in certain circumstances.[41]

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[40] See William R. Strelow, *Loans to Clients for Living Expenses*, 55 Cal. L. Rev. 1419, 1431 (1967) ("[T]here is a substantial likelihood that a destitute claimant will be compelled to abandon his claim or settle it for a trifling amount unless he can obtain financial assistance."); Koval, supra, at 1118. ("There are several good reasons why a lawyer should be able to lend a client money for living expenses. First, and most importantly, sometimes a client simply will not be able to pursue a claim if he cannot meet his basic living expenses. He may be forced to settle for a smaller amount than he deserves."); Dawn S. Garrett, Comment, *Lending a Helping Hand: Professional Responsibility and Attorney-Client Financing Prohibitions*, 16 U. Dayton L. Rev. 221, 246 (1990) ("The purpose of the prohibition is to prevent oppression in the legal system by the wealthy. This purpose will be frustrated if an impoverished client can be forced by means of financial hardship to accept the inadequate settlement offer of a wealthier opponent who can afford to wait out the delays of litigation.").

[41] See Alabama Rule of Professional Conduct 1.8(e)(3); California Rule of Professional Conduct 4-210(A)(1) & (2); District of Columbia Rule of Professional Conduct 1.8(d)(2); Minnesota Rules of Professional Conduct 1.8(e)(3); Montana Rule of Professional

(continued...)

The Bar Association concedes that the prohibition may not be justified and that modification of the rule may be in order:

> [B]ar counsel is persuaded by a review of disciplinary cases in other jurisdictions and the professional conduct rules in the seven sister jurisdictions identified by ATLA [that have modified the rule to allow advances for living expenses] that these rationales or justifications are subject to good faith debate among reasonable lawyers and that serious consideration should be given to a review and revision of ARPC 1.8(e) to permit such assistance under certain circumstances.

The Bar Association nonetheless contends that this appeal is not the appropriate vehicle for modifying Rule 1.8(e) on policy grounds. Instead, it argues that "there is an established procedure for promulgation and adoption of these rules which should not be ignored simply because both parties do not like the present rule." We agree.

Under the Alaska Bar Association Bylaws, the Rules of Professional Conduct Committee is "responsible for reviewing suggested amendments to the [Alaska Rules of Professional Conduct] and making recommendations

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[41](...continued)
Conduct 1.8(e)(3); North Dakota Rule of Professional Conduct 1.8(e)(3); Texas Disciplinary Rule of Professional Conduct 1.08(d)(1); Disciplinary Rule 5-102(B) of the Vermont Code of Professional Responsibility.

for amendments to the Board of Governors."[42] While we express no opinion as to the merits of the policy arguments surrounding Rule 1.8(e), we note that members of the bar are free to suggest rule changes to the Rules of Professional Conduct Committee as the first step towards amending the rules. We see no reason to vary from this process in this case.

B. Alaska Civil Rule 90.2

Apart from his concerns about Rule 1.8(e), Markham also argues briefly that a lawyer who has been approached by a child's guardian to represent the child's interests in a personal injury case is entitled to court approval of a proposed contingent fee and cost agreement before agreeing to undertake the representation. Under this proposal, a lawyer could "respectfully disagree" with the fee approved by the court and decline the representation. Markham further seeks

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[42] Alaska Bar Bylaws, article VII, section 1(a)(9).

clarification of Rule 90.2,[43] which he alleges is "defective because it provides no standards."

These arguments are undeveloped and Markham's brief "leave[s] most of the reasons supporting an improvement in ARCP 90.2 procedures and standards for the members of this Court to suggest and debate." We see no reason to usurp counsel's role. Because the argument is not adequately briefed, we deem it waived.[44]

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[43] Rule 90.2 provides in relevant part:

> (a) Approval of Settlement of Claims on Behalf of Minors.
>
> (1) Approval. A parent or guardian of a minor who has a claim against another person has the power to execute a full release or a covenant not to sue, or to execute a stipulation for entry of judgment on such claim. However, before such a document is effective, it must be approved by the court upon the filing of a petition or motion.
>
> ...
>
> (3) Attorney's Fees and Costs. The court shall approve any attorneys' fees and costs that are to be paid from the settlement proceeds when the minor claimant is represented by counsel.

[44] See *Adamson v. University of Alaska*, 819 P.2d 886, 889 n. 3 (Alaska 1991).

C. ATTORNEY'S FEES

Finally, in the last paragraph of his opening brief, Markham seeks attorney's fees:

> The Superior Court should be further instructed to award SH her reasonable attorney's fees for the excess effort incurred by her counsel in securing the approval of these loans under the guidelines of ARCP 82, or on a public interest basis. This award should be entered against the party this court feels was the real party in interest in the judgment below.

In his reply brief, Markham further explains that "[t]his court should simply declare which organization)court or Bar?) was responsible for this rule and assess fees accordingly."

We decline to award attorney's fees. Given that we reject Markham's claims for reimbursement under Rule 1.8(e), he is not the prevailing party within the meaning of Alaska Civil Rule 82.[45] Moreover, Markham offers no reason to confer upon him the status of public

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[45] Rule 82 provides in pertinent part:

> (a) Allowance to Prevailing Party. Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.

interest litigant, and in our view he does not qualify as one.[46]

IV. CONCLUSION

Because we conclude that Alaska Rule of Professional Conduct 1.8(e) prohibits lawyers from advancing funds for living expenses to clients and that the rule does not unconstitutionally deny or infringe upon access to the courts, we AFFIRM the decision of the superior court.

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[46] See e.g., *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 972 n. 21 (Alaska 1997) (stating criteria for public interest litigant status).

APPENDIX B
Ak. Supreme Court 12/22/98 Order
Denying Petition for Rehearing

IN THE SUPREME COURT OF THE STATE OF ALASKA
In The Matter of the Minor Child:
K.A.H.
Supreme Court No. S-07761
ORDER
Petition for Rehearing
Date of Order: 12/22/98
Trial Court Case # 3KO-93-00055CP

Before: Matthews, Chief Justice, and Compton, Eastaugh, Fabe and Bryer, Justices

On consideration of the Petition for Rehearing filed on December 7, 1998, IT IS ORDERED: The Petition for Rehearing is DENIED. Entered by Direction of the Court.

Clerk of the Appellate Courts, Marilyn May

cc: Supreme Court Justices
Judge Hensley
Trial Court Appeals Clerk/Anchorage
West Publishing for Opinions
(Opinion 5049, 11/27/98)

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APPENDIX C
Ak. Supreme Court
Petition for Rehearing
December 7, 1998

IN THE SUPREME COURT OF THE STATE OF ALASKA
In The Matter of the Minor Child:
K.A.H.
Supreme Court No. S-07761

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Attorney for Appellant Sandy Haase Halsey

PETITION FOR REHEARING

COMES NOW SH by counsel pursuant to Appellate Rule 506, and petitions this court for rehearing. Grounds for this petition pursuant to Appellate Rule 506(a)(1)-(2) exist. This Court overlooked, misperceived, or failed to consider a decision or principal directly controlling, or a material question of fact or proposition of law as more fully described herein.

1. FEDERAL SUPREMACY

This court's opinion overlooks, misperceives, or fails to consider Appellant's Br., pg. 28-36; Reply Br., pg. 10-19, urging the ARPC 1.8(e) prohibition to an attorney guaranteeing or directly making loans for living expenses to a general maritime law / Jones Act seaman's statutory beneficiaries during the pendency of their suit for wrongful death to recover the benefits expressly provided the beneficiaries of this special class of federally protected workers' violates their paramount federal rights to pursue their remedy in state court as Congress specifically intended. In support for this position Petitioner's briefs exhaustively demonstrated

that such loans have historically been a traditional method of aiding FELA Act workers withstand the insurmountable pressure to inequitably settle their claims during the difficult period that is occasioned by the delays that necessarily must occur during the pendency of the necessary litigation to collect their benefits. This practice was judicially recognized[1] as an ethical and acceptable activity for FELA workers' counsel since (at least) shortly after FELA's (1908) passage. And significantly this recognition occurred in the period after the passage of FELA, but prior to the passage of the Jones Act in 1920 (which makes FELA applicable to seamen by reference *including its judicial gloss*). Compare *Cook v. Ross Island Sand & Gravel*, 626 F.2d. 746 (9th Cir., 1980).[2]

As further recognized in the cases cited at Appellant's Br., pg. 23-26, following the passage of the Jones Act, this "practice" of lawyers representing FELA / Jones Act workers continued through the 1930's and on to the 1970's,[3] despite the adoption of former DR 5-103 and its interpretation prohibiting such activity by a

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[1] Specifically in two state Supreme Court cases: *Johnson v. Great Northern Railway*, 151 NW 125 (Mn., 1915), and *Mytton v. Missouri Pacific RR*, 211 SW.111 (Mo., 1919).

[2] As well as the general maritime law (unseaworthiness) wrongful death claim which (generally) also looks to the Jones Act for its remedy. See *Miles v. Apex*, 498 US 19, 33-37, 112 L.Ed.2d. 275, 291-293, 111 S.Ct. 317 (1990).

[3] Where it was expressly recognized by Justice Harlan in his concurrence in *United Transportation Union v. Michigan Bar*, 401 US 576, 91 S.Ct. 1076, 28 L.Ed.2d. 339, 353 (1971).

majority of the courts that had addressed the issue. Moreover as the authorities Appellant cited reflect, this "practice" continues unabated to this day.[4]

This issue is to be distinguished from the First Amendment "associational rights" issue that this court addressed at pg. 10-12 of its opinion. Rather, this claim arises both out of the comprehensive nature of the federal general maritime and federal statutory comprehensive scheme for these workmen's recovery, and out of the FELA/ Jones Act's unique provisions set forth in 45 USCA §56, 28 USCA §14455(a), and the federal statutory *right* of these workmen to compel the enforcement of their "special" federal statutory remedies [5] in a state court forum. See Appellant's Br., pg. 32. As such ARPC 1.8(e) "works a material prejudice to the characteristic features of the *general* maritime law",[6] and also violates the statutory scheme of the Jones Act; and as a result violates the federal supremacy clause of the United States Constitution.

This argument was authoritatively supported and is hardly frivolous. On the contrary, it closely resembles the challenge to the application of ARCP 82 to the seamen who brought unsuccessful Jones Act and

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[4] Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 Fordham L.Rev. 1307 (1998).

[5] As well as their (symbiotic) general maritime wrongful death claim for unseaworthiness.

[6] A test applicable only to *general* maritime law cases such as *American Dredging Co. v. Miller*, 510 US 443, 114 S.Ct. 981, 127 L.Ed.2d. 285 (1994), but which this court has uniquely applied to a seaman's federal statutory Jones Act state court suit in *Hughes v. Foster Wheeler Co.*, 932 P.2d. 784 (Ak., 1997)?

General Maritime claims in *Hughes*.[7] Moreover as pointed out in Appellant's briefs, a similar argument to the constitutionality of former ARCP 82 was recognized on state constitutional grounds by Justice Matthew and Justice Compton in their dissent in *Bozarth v. Atlantic Richfield Oil Co.*, 833 P.2d. 2 (Ak., 1992).

2. EQUAL PROTECTION / RATIONAL BASIS

Petitioner also respectfully suggests this court's failed to consider a directly controlling principal in addressing the arguments at Appellant's Br., pg. 42-43 Fn. 75, and Appellant's Reply Br., pg. 5, 33-34 (and at ATLA's Amicus Br., pg. 15-18). As Appellant there urged, even if ARPC 1.8(e) merely "touches upon" or impedes the exercise of a "fundamental" or "important" constitution right,[8] it nevertheless will be subject to "close scrutiny" and be held to deny Equal Protection if it is not "narrowly drawn" and "necessary to promote a

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[7] At Appellant's Br., pg. 32, Petitioner (correctly) stated that an exceedingly authoritative) petition for certiorari was filed in *Hughes* on June 9, 1997 challenging the application of ARCP 82 to these seaman (because Appellant's counsel was provided an advance copy thereof by the *Hughes* counsel and asked to comment on it). Ironically that petition was thereafter dismissed by the US Supreme Court clerk's office. Due to an error in *Hughes'* counsel's office, the petition was untimely filed!

[8] As Appellant and ATLA pointed out in *Patrick v. Lynden Transport Inc.*, 765 P.2d. 1376, 1378 (Ak., 1988), this court refrained from deciding whether the right of access to the courts was "fundamental", but noted it was nevertheless an "important" constitutional right. The Alaska Bar conceded it was "hardly in a position to disagree". Ak. Bar Br., pg. 22.

compelling governmental interest".[9] Alternatively the governing authority that adopted this rule must at least show that it withstands the *rational* basis test.

Petitioner's disagreement with this court's analysis of the weight or impact on this constitutional right aside, in fact when this Court concluded its analysis and logically should have addressed either the "compelling government interest" or the "rational basis" (i.e., "policy arguments") for the rule, it noted:

> "The Bar Association concedes that the prohibition may not be justified and that modification of the rule may be in order." Opinion, at pg. 14.

Petitioner respectfully suggests that if the prohibition "may not be justified", the rule may nevertheless not constitutionally stand, even if the "governing body" that adopts the rule indicates its receptivity (after debate) to a modification of the rule. Where as here that "governing body" is in fact not the Bar, but this court, which has clearly expressed " no opinion" on the "policy arguments" (i.e., their rational basis) for the rule (Opinion at pg. 15), this failure of analysis (that most certainly would be compelled of any other legislative or administrative "governing body's enactment), fails to satisfy the constitutional standards that it has itself established.

Respectfully Submitted this 7 day of December, 1998.
Gerald W. Markham
Attorney for Petitioner SH
Ak. Bar No. 7210058

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[9] As pointed out by dissenting Justice Matthew in *Patrick v. Lynden Transport Inc.*, 765 P.2d. 1376 (Ak., 1988), that case did not involve an actual "barrier" to the court, but merely an impediment.

APPENDIX D
Alaska Superior Court
Memorandum in Support of
Motion for Reconsideration
February 1, 1996 [sans exhibits]

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA, THIRD JUDICIAL
DISTRICT AT KODIAK

IN THE MATTER OF THE MINOR CHILD
KARI ANNE HALSEY
d.o.b. 9/21/85
Case No. 3KO-93-55 PR
MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION[1]

A. PRELIMINARY STATEMENT

Petitioner's counsel appreciates this court's expression of concern for his welfare vis-a-vis the State Bar

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[1] Technically the court made no ruling on either your undersigned's claims for advances or Sandy Halsey's claim for administrative fees; however at the close of the hearing it directed $50,000 (i.e., the settlement, sans attorney's fees and costs, but not "advances") to be held for disposal in the "probate" estate proceedings. Although it may practically be a distinction without a difference, your undersigned believes the "advances" should more appropriately be addressed in the ARCP 90.3 proceedings. The ARCP 77(k) basis for reconsideration is that this court has overlooked a directly controlling decision or principal of law and/or misconceived a material fact or proposition of law.

Association[2] in his pursuit of the recovery of the humanitarian loans made to his client during the pendency of this litigation. But with all due respect, it is not Petitioner's counsel's conduct, but the rules of the Alaska Bar Association 1.8(e) that are in danger generally of being stricken if the interpretation suggested preliminarily by this Registrar were correct (discussed infra). Petitioner's counsel, however, seeks to make no "test" case out of this,[3] but Petitioner's counsel is quite adamant that not only has he done "nothing wrong" in this matter, but on the contrary, the

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[2] Though he would rather that if this court had concerns on the subject it could perhaps have allowed him to make an authoritative explanation, before, based on (it would appear to Petitioner's counsel) no more authority than the unclear language in Alaska Bar Rule 1.8(e), it *sua sponte* so strongly declared (in front of his client) that your undersigned, an attorney who has practiced before this Bar for 26 years without once being even privately admonished for his conduct, was potentially guilty of unethical misconduct for making humanitarian advances to his client for necessities in this federal seaman's paramount maritime employment death action. To the extent that this exchange was the result of your undersigned's failure to anticipate this Registrar's unfamiliarity with the issue and to have authoritatively addressed the matter in his Petitioner for approval of his fee, he apologizes in advance.

[3] As the court can see infra, pg. 4, "test cases" on this particular factual issue, in this unique area of the law, have already been brought long ago. These principals are actually ripe to be extended to the law generally (see infra, pg. 9).

small non-interest bearing, humanitarian advances which he facilitated here were made only well after this court's approval of his engagement on behalf of this deceased seaman's very young minor child, and only in her family and sole care giver's state of desperate need, in the furtherance of the prosecution of this child's paramount maritime claims pursuant to counsel's right (nay, in all probability, his professional duty) under paramount Maritime Federal law.[4]

That some attorneys are not willing to make such humanitarian advances to their clients (or make them covertly but are too cowered by "establishment" (i.e., ABA promoted) State Bar interpretations arguably suggested by Alaska Professional Code 1.8(e) to admit it, is only a poor testament to their failure (or apathy) to know their legal rights (nay, perhaps their professional duties) in this maritime law situation. It is also perhaps a testament to the low self-esteem many victim's attorneys often more modernly have, despite the good work that they do in the face of a current contrary public perception promoted largely by "big business" (and their insurance companies), and those members of the Bar who represent their interests, who concurrently disdain the representation of the common working man and his all-too-frequent common problems, as evidenced quite handily in this case.[5]

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[4] Which as it happened may have been a major factor in saving this child's mother's life, if not at least putting her on the road to recovery from her illness.

[5] Which is not to suggest that some excesses by some members of the victim's Bar (motivated in part by profits) is not also the cause of the public (and their brethren's) lack of respect. Compare *Florida State Bar v. Went-For-It, Inc.*, 132 L.Ed.2d. 541 (1995).

Your undersigned does not seek a medal for turning a case[6] into a $665,000 settlement which after fees will provide this seaman's little girl (and incidently her family) with what amounts to the "American Dream" that her father in a lifetime probably never could (albeit at the sacrifice of his life in a most horrible death). Rather Plaintiff's counsel only seeks his ethically set and validly earned fees and reimbursement of his legitimate costs and humanitarian advances he facilitated in the course of a long hard fight.[7]

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[6] That this vessel's underwriters's adjuster denied and which after suit Defendant's counsel offered Plaintiff no more than $175,000 until one month before trial.

[7] And perhaps a word of admiration rather than a suggestion of ethical impropriety from his colleagues whom one hopes should know that his fee, costs, and a return of his non-interest bearing humanitarian advances is not only warranted compensation for work in a very specialized field, which a reference to the local yellow pages suggests many attorneys aspire to, but only a few in fact know how to even begin, let alone successfully complete. And the hope that they too come to know (so that they too may better perform their duties) that humanitarian advances in the course of a seaman's injury/death representation are totally proper. The compensation Petitioner's counsel was awarded is both what this court's duly appointed personal representative agreed (and this court thereafter conditionally approved at the onset of this representation), and one this court recognized was reasonable and fully ethical under the circumstances of a long complex seaman's wrongful death claim. Petitioner's

(continued...)

B. THE PROPRIETY OF NON-INTEREST BEARING HUMANITARIAN ADVANCES TO CLIENTS OR ON THEIR BEHALF BY LAWYERS IS WELL RECOGNIZED AS NECESSARY AND PERMISSIBLE, AND IS A CLOSED ISSUE IN THE FEDERAL LABOR COMPENSATION LITIGATION (I.E., JONES ACT/UNSEAWORTHINESS CLAIM)

It is beyond dispute that your undersigned was retained for just one purpose, to represent this court's duly appointed personal representative of the estate of a deceased crewman on behalf of his daughter, the express statutory beneficiary of the deceased under the Jones Act and the General Marine Law of Unseaworthiness.[8]

Proceedings directly to the law in point, *In Re. Ratner*, 399 P.2d. 865, 874 (Kan., 1965), and *Louisiana State Bar Ass'n. v. Edwin*, 329 So.2d. 437, 446 (La., 1976), expressly holds State Bar "ethics" prohibitions on humanitarian advances directly made or facilitated by attorneys to clients in the course of the prosecution of their federally authorized litigation, would limit the lawyer's representation of this Congressionally protected class of people, and handicap the claimant's rights to pursue his federal claims in violation of the US Supreme Court mandate to the contrary in *Brotherhood*

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[7](...continued)
counsel interprets this Registrar's remarks in which she admitted she has seen lower results obtained by others in cases in this area to mean she concurred.

[8] *See* complaint in *Sargent v. Sea Ventures, Inc.*, No. 3KO-94-404 Civil, alleging only federal causes of action brought in state court pursuant to the Savings to Suitor's clause, 28 USCA §1333; see *Shannon v. City of Anchorage*, 478 P.2d. 815 (Ak., 1970).

of Railroad Trainmen v. Virginia, 377 US 1, 84 S.Ct. 1113, 12 L.Ed.2d. 89 (1964).[9] Compare also *Dombey, Tyler, Richards & Grieser v. Detroit T. & I R. Co.*, 351 F.2d. 121, 129-139 (6th Cir., 1965). As expressly noted in *Brotherhood*, supra, at 12 L.Ed.2d. 89, 93:

> "A state could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the rights of individuals and the public to be fairly represented in law suits authorized by Congress to effectuate the basic public interest."

In *United Transportation Union v. Michigan*, 401 US 576, 28 L.Ed.2d. 339, (1971), the US Supreme Court extended *Brotherhood* further to reverse an injunction by a Michigan state court issued in favor of its state bar association that prohibited:

> "Stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured person or their families pending settlement of their claims."

In addressing this issue in his concurrence at 28 L.Ed.2d. 339, 353, Justice Harlan stated:

> "It is not generally improper for an attorney to make advances to clients; it is considered improper for him to use the fact that he makes them as a drawing card in an effort to secure professional

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[9] There applying FELA, 45 USCA §51, which is adopted by reference in the Jones Act, 46 USCA §688. *Edwin*, supra, directly address the Jones Act.

employent."[10]

While Justice Harlan found the "advertisement" of an attorney's practice of making advances"[11] of living expenses to his clients to be a "close questions", it is notable that no member of the court in *United Transportation* found fault with the concept of loans to clients during the prosecution of their federal claims themselves to be at all improper. On the contrary, the majority opinion in *United Transportation*, went on to sweepingly strike all the provisions of the Michigan State Court decree, including those prohibiting the advertisement of such loans!

Our Supreme Court in **In Re.: Estate of Katchateq**, Op. No. 4295 (Dec. 8, 1995), recently noted that Federal law controls attorney conduct in the prosecution of federal cause of action (even when prosecuted or reviewed by state courts).[12] In *Katchateq* the issue was the rate of attorney's contingent fees in a paramount federal cause of action, our court acknowledging that it had the obligation under the Federal Tort Claims Act to limit the contingent fees of the attorney in that case to 25% as proscribed in that Act. Even in the

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[10] This is the distinction that has come to be noted in all of the "modern" judicial opinions that have criticized any humanitarian advance prohibition recently (discussed infra).

[11] An issue not remotely present here; see Sandy Halsey affidavit, para. 3.

[12] This is an application of the principal of "reverse *Erie*, described in *OffShore Logistics v. Tallentire*, 477 US 207, 91 L.Ed.2d. 174, 190 (1986); see also *Weason v. Harville*, 706 P.3d. 306, 308 (Ak., 1985).

absence of Congressional action, the Federal General Maritime Law governs the issue of attorney fees. Compare *Weason v. Harville*, supra, at 311 Fn. 3.[13]

Nothing has changed in this area of federal law since **Brotherhood** and **United Transportation**. The holdings

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[13] The holding of *Weason* allowing punitive damages for underpayment of maintenance and cure, has recently been seriously challenged by two recent federal court opinions in the aftermath of *Miles v. Apex*, ___ US ___, 112 L.Ed.2d. 275 (1990); see *Glynn v. Ray Al Boat Mgt. Corp.*, 57 F.3d. 1495 (9th Cir., 1995); and *Guevara v. Maritime Overseas Corp.*, 59 F.3d. 1496 (5th Cir., en banc, 1995). While *Weason* remains the law in Alaska until the Alaska Supreme Court or the US Supreme Court reverses it, *Glynn* and *Guevara* will bring pressure for *Weason*'s reversal. This in turn will bring issues of humanitarian advances in seamen's cases all the more to the forefront as vessel owners and their carriers will have even less incentive to pay this already frequently unpaid or underpaid, meager living stipend. In that event the pressure and duty of the maritime victim's Bar to come to the humanitarian aid of seamen clients will undoubtedly increase. Despite all of its problems at least injured seamen (theoretically) have this ancient meager general maritime law relief during the "curative" phase of their compensation recovery. The dependents of deceased seamen on the other hand have nothing. Absent humanitarian assistance from others or their counsel, the result will be that the rights of all but the wealthiest of these dependents (i.e., those who need it most) will be unfairly compromised by the inevitable problem of delay in getting their cases heard -- a result the Defendants of this type of litigation (and the counsel for their carriers) undoubtedly will take "delight" in!

of *Ratner* and *Edwin* as applicable to Jones Act cases has not been challenged or refuted by any other court addressing a federal labor law claim.[14] On the contrary, following the adoption of Model Professional Code 1.8(e), the Louisiana Court of Appeals not only recently reaffirmed *Edwin*, but in fact extended it to apply to a humanitarian loan guarantee made in the course of a state law cause of action (in the face of a rule identical to Alaska's), suggesting that a lawyer may even have an ethical duty to do so when he can afford it. *Dupuis v. Faulk*, 609 So.2d. 1190, 1193 (La. App., 3rd., 1992).

Similarly in recognition of the "federal" nature of this problem, the principal was recently extended in **Rand v. Monsanto Co.**, 926 F.2d. 596, 600 (7th Cir., 1991), to abrogate a state bar rule (DR 5-103(B)), restricting the advancement of costs in federal stockholders' class action litigation. See also *Boccardo v. CIR*, 56 F.3d. 1016, 1019 (9th Cir., 1995), disregarding local state bar rules on the issue as pertaining to the issue of the deductibility of said advances for federal income tax principals.

In summary the opinions in *Ratner* and *Edwin* should be compelling in the resolution of the federally based claims giving rise to this court. The principal is well supported by the US Supreme Court decisions cited. *Ratner* and *Edwin* are directly on point; no authority (to your undersigned's research) holds otherwise in the area of humanitarian advances in federal based litigation (i.e., FELA/Jones Act); and these holdings contradict no established precedent by our Alaska Supreme

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[14] As discussed infra, the rationale of these cases has not been extended by some state courts to state law claims, but a modern trend suggested it should be; (discussed infra).

Court (or even a published Alaska Bar opinion). As Petitioner shall demonstrate infra, the conduct in fact does not even violate Ak. MPC 1.8(e) as that rule is likely to be interpreted by the Alaska Supreme Court.

C. AK. BAR RULE 1.8(e) DOES NOT PROHIBIT ATTORNEY FACILITATION OR DIRECT LOAN OF SUMS FOR HUMANITARIAN NEEDS OF CLIENTS MADE AFTER (AND NOT IN FACILITATION OF) THE CONTRACT OF ENGAGEMENT. ANY INTERPRETATION TO THE CONTRARY WOULD VIOLATE THE FEDERAL AND ALASKA GUARANTEE OF FREE ASSOCIATION AND EQUAL PROTECTION

No decision by the Alaska Supreme Court or published Bar opinion that your undersigned is aware of,[15] has ever held or even suggested that the advancement, guarantee or assistance in obtaining interest free funds to a destitute client for humanitarian reasons made well after the execution of a contingent fee contract (and not as an inducement to representation) is violative of the Alaska Code of Professional Responsibility. On the contrary, as described in *State Ex. Rel. Okl. Bar Ass. v. Smolen*, 837 P.2d. 894, 897-898 (Okl., 1992, Kauger dissenting), the decisions of many courts approved of the practice (authoritatively citing cases on both sides of the issue) in state law based actions.

As noted in Hazard's *The Law of Lawyering* pg. 274, 275 (1996 Supp.), the proposed final draft of the Model Rules would have loosened what was to become Model Rule 1.8(e) to expressly allow a lawyer to advance "living expenses" in addition to "litigation

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[15] Before or after the adoption of Ak. MPC 1.8(e).

expenses",[16] and permit the repayment of either to be dependent on the outcome of the litigation the attorney is handling.

In point of fact in the words of Hazard: "This proved to be too much of a liberalization" to the ABA House of Delegates who amended the rule to delete the provision for advances for living costs, but permitted advances for litigation costs without guarantee of repayment.[17]

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[16] Compare Texas rule, attached as Ex. D hereto.

[17] That amendment is however, not expressly mentioned in either the "official comments" or the "Alaska Comments". On the contrary the official comments on the rule states:

> "This general rule which has its basis in common law champerty and maintenance ***is subject to specific exceptions developed in decisional law and continued in these rules*** such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in Para. (e)." [bold added]

As noted in Annotated Model Rules, pg. 96, interpreting a nearly identical term in ABA Model Code DR 5-103((B):

> "The list of exceptions interpreting this language is not exclusive but illustrative."

This same point was discussed in *Dupuis*, supra, at 1192, which found said advances:

> "More akin to the authorized advance of expenses of litigation, rather than to the prohibited advances made with improper motive to buy representation or by way of

(continued...)

The meaning of the term "expenses of litigation" is subject to a variety of interpretations in a variety of contexts,[18] as the affidavits of Ms. Halsey and your undersigned clearly establish. Some of the advances your undersigned arranged here are clearly in the nature of "costs of litigation", i.e., an airfare to fly Ms. Halsey up to Kodiak to attend her deposition. Ms. Halsey has small children -- hence a baby sitter necessary for her to attend her deposition clearly is a "cost". How is it different if an attorney pays for a client's haircut and a new suit before trial, or pays for the cost of an alcoholism and drug rehabilitation program in an attempt to avoid the risk of his client showing up drunk during a critical stage in the trial? If that is true, why then can't an attorney also advance the cost of basic food and/or shelter so that the client will not appear in court

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[17](...continued)
advertising to attract clients."

Dupuis goes on to hold:

> "We note that the disciplinary rule permitting the advances of 'expenses of litigation' includes certain instances as illustrative, but that it does not clearly exclude other expenses similarly necessary to permit the client his day in court..."

[18] The "legislative history" behind the "Model Act" (i.e., the deletion of an amendment that would have expressly adopted the interpretation Petitioner seeks here) before the ABA is due little deference. The Alaska version of MPC 1.8 is different from the "Model" version in several respects. Compare *U. of A. v. Shanti*, 835 P.2d. 1225 (Ak., 1992) addressing Alaska's treatment of "Model acts" containing local amendments.

to be emaciated, despondent or desperate?

Such attenuated distinctions[19] and the many other avenues of avoiding the prohibition of some Bar rules prohibiting loans to clients that "evolved", to be embodied in the predecessors of MPC 1.8(e), potentially make criminals out of honest lawyers, nay, very moral lawyers, who have seen first hand the economic consequences to a tort on a victim engaged in a hand to mouth existence before they were injured. Such victims are often simply destroyed in a matter of months while their case of clear liability is denied by a tort feasor's insurance carrier as they leveraged a low settlement with the force of the inevitable delays occasioned in getting every case to trial. These delays can of course be aided by further unethical conduct in theoretical violation of MPC 3.2, but which is in fact virtually impossible of detection, let alone enforcement!

As noted by Justice Kennedy in speaking for a minority of four justices on the related issue in *Went For It*, supra, at 132 L.Ed.2d. 541, 557:

> "This scheme makes little sense. As is often true when the law makes little sense, it is not first principals, but their interpretation and their application that have gone awry."

Such is surely the case with some early to mid-1900's anti-labor law/victims rights era judicial interpretations of the ancient prohibitions in the law of champerty. In a modern setting to prevent humanitarian advances to client under the all-too-frequent cir-

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[19] I.e., an attorney can encourage or guarantee a loan made by a third person (at potentially usurious rates. So rather than an attorney making the loan himself, he introduces them to "a friend". Compare *In Re. Ratner*, 399 P.2d. 865, 874 (Kan., 1965).

curnstances here denies them the free association they need to achieve equal protection under law.

As noted in *Smolen*, Louisiana by court decision[20] and California and Minnesota by court rule have allowed attorneys to make, arrange, or guarantee humanitarian non-interest bearing loans in the nature of necessary living expenses to their clients. To that list must now modernly be added at least Texas; see Ex. D hereto, and your undersigned believes a vast number more.[21]

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[20] To which *In Re.: Ratner* and *Edwin*, supra, join in the federal labor law area.

[21] In the remote event that this court would disagree, the appropriate course in your undersigned's opinion would be to appoint the "public guardian" to represent the minor child's interests on this issue, see AS 13.26.360-.400. Obviously the child's mother does not wish to represent a contrary position, nor does the existing personal representative. On the contrary as stated at the last hearing, he has concluded his work, and he has asked to be relieved. While the minor child's interest in avoiding repayment of any arguably improper advances are obviously in conflict with your undersigned's desire to be repaid, an element of economic reality comes into play here as well. While the court is certainly capable of representing the child's interest in this matter by independently researching and satisfying itself of the validity of your undersigned's claim in the nature of the supervision of a one-time transaction pursuant to AS 13.16.440, AS 13.16.670, *Matter of Estate of Pushruk*, 562 P.2d. 329, 333 Fn. 14 (Ak., 1977), it obviously is unable to defend any appeal from any adverse judgment it might choose to reach. And while a person could be appointed to

(continued...)

CONCLUSION

Your undersigned's advances should be approved, and their payment authorized from your undersigned's trust account subject to any recalculation of your undersigned's fee as may be appropriate in light of the

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[21](...continued)
represent the minor's interest, this would not be cheap. Additionally the appointment of the public guardian is appropriate because the sums involved may well not be enough to justify the retention of a private attorney to represent the child's theoretical interest in avoiding the payment of a sum amounting to no more than an amount between $6,625.00 and $4,950.00, depending on whether this court views these advances as "loans" or costs of litigation.

Because your undersigned personally does not believe there is any doubt that these loans in this federally based litigation are both ethical and hence repayable from this settlement, does not mean that an "argument" within the meaning of Ak. MPC 3.1 and ARCP 11 could not be made to the contrary supported by the holdings of other jurisdictions generally, or with respect to Federal law (FELA/Jones Act) specifically that the US Supreme Court has perhaps never unequivocally authorized humanitarian loans by attorneys to clients. (But see *United Transportation*, supra.)

Accordingly pursuant to Ak. Model Code 1.14, your undersigned believes he must advise this court that he has gone about as far as he feels comfortable in advocating his position and that of the minor child's simultaneously here. If this court still has doubts or disagrees with petitioner's counsel, but nonetheless has doubts as to the practical economics of a contrary argument, the public guardian should be appointed to review the matter.

additional facts that have come to light surrounding this issue.[22]

Respectfully Submitted this 1 day of February, 1996.
Gerald W. Markham
Attorney for Petitioner
Sandra Jean Haase Halsey,
Mother and Natural Guardian
of Minor Child Kari Anne Halsey

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[22] See affidavit of Gerald Markham, hereto.

APPENDIX E
(October 31, 1995
Alaska Superior Court
Mediator's Affidavit)

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA, THIRD JUDICIAL
DISTRICT AT KODIAK

IN THE MATTER OF THE MINOR CHILD
KARI ANNE HALSEY
d.o.b. 9/21/85
Case No. 3KO-93-55 PR

AFFIDAVIT OF DOUG SERDAHELY

COMES NOW Doug Serdahely, and states under oath that:

1. I am an attorney admitted to the Bar of Alaska since 1972. After clerking for the Alaska Supreme Court I practiced trial law in the State of Alaska from 1973 -1980, when I was appointed a superior court judge at Anchorage. I was presiding judge for Anchorage from 1985 to 1988. In 1989 I resigned from the bench to accept a partnership with the law firm of Bogles & Gates in Anchorage. Since coming to Bogles & Gates I've resumed trial practice, much of which is maritime. I am a member of the Maritime Law Association, and I have bene asked to serve as a mediator in a number of personal injury cases.

2. On or about October 6, 1995, I was asked by the parties and agreed to serve as a mediator in the case of *Sargent v. Sea Venture Group*, Case No. 3KO-94-404 Civil. Pursuant to that duty I call for the parties to submit mediation briefs, depositions and exhibits that the parties felt relevant to the merits of the case.

3. After reviewing the parties' presentation and seeing their performance at the mediation, it appeared to me both sides were well represented by counsel who had thoroughly prepared their case and were fully prepared for trial, and both had evidence to support their positions. Defendants had not conceded liability (urging third party Defendant Marco liable), and had clearly not conceded damages. Offers before mediation were Defendants, $175,000, Plaintiff, $1,000,000 (arguably primary policy limits). Defendants' opening offer at the mediation was $225,000. Plaintiff only near the end of the mediation retreated from his position when it appeared clear that excess insurance ($4 million) would contribute nothing toward settlement and that there was arguable merit in Defendant's damage defense.

4. While there were many compelling facts in this case that suggested a verdict over the $665,000 proposed settlement could be obtained, it was by no means clear that it would be. A verdict substantially over a million was remote. This evaluation was reflected in Defendant's adamant refusal to accept a $1 million policy limits offer when made approximately one year post accident near the outset of the litigation, and again at the mediation.

5. Due to the arguable deductibility of "defense costs" from policy limits as trial approached, which by the time of the mediation Defendant represented $335,000 in defense costs had been incurred, the pressure of further decreasing limits and the strengths of Plaintiff's case as developed by Plaintiff's counsel, together with my evaluation of the strengths of Plaintiff's case, appear to have motivated Defendant to reconsider and offer their remaining limits of $665,000.

6. Given the facts of the case, it is my opinion this settlement is a very good one for this minor child. I concur with Defendant's position that a jury could well

award less than this offer. When coupled with the interests of the child receiving these sums now in her minority when she needs it, I was prompted to urge Mr. Markham and Mr. Sargent, Plaintiff's personal representative, to accept the offer. And I urge the court approve it now.

DATED this 31 day of October, 1995.

Douglas Serdahely

SUBSCRIBED and SWORN to before me, a Notary Public, State of Alaska, on this 31 day of October, 1995, at Anchorage, Alaska.
WITNESSETH my hand and official seal on this date and year hereinabove written.

Vallore Paulsberg
Notary Public, State of Alaska
Commission Expires: 6/28/97

APPENDIX F
Alaska Superior Court Order
May 13, 1996

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA, THIRD JUDICIAL
DISTRICT AT KODIAK

IN THE MATTER OF THE MINOR CHILD
KARI ANNE HALSEY
d.o.b. 9/21/85
Case No. 3KO-93-55 PR

ORDER

IT IS ORDERED that Petitioner's counsel Gerald W. Markham is due an additional $3,050.00 amount to reimburse him for costs, to be paid to him from his trust account.

Recommended this 20th day of February, 1996.
Anna Moran, Registrar

Approved this 13th day of May, 1996. Mr. Markham should ask the Supreme Court to reexamine Professional Conduct Rule 1.8 if he finds it inappropriate. The court will not consider a challenge rule absent an adversary proceeding.

Hon. Joan Woodward, Superior Court Judge

APPENDIX G
May 23, 1996 Ak. Superior Court
Memorandum in Support of
Motion for Reconsideration

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT
AT KODIAK

IN THE MATTER OF
THE MINOR CHILD
KARI ANNE HALSEY,
d.o.b. 9/21/85
Case No. 3KO-93-55 PR

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

As recently stated in Edington, *Ethics at Sea* 70 Tulane LR 415, 466 (1995):[1]

> "In litigation cases the lawyer may advance fees on a contingent fee case or make a loan to a client, which will be paid out of any recovery." [underline added]

In support of this unqualified assertion this experienced San Francisco Bay area maritime practitioner cites both Model Rule 1.8(e) and California Rule 4-

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[1] This recent article came to your undersigned's attention just days before this court's ruling in connection with his research in another case, and hence he was unable to cite it sooner.

210[2] in the course of addressing a wide variety of related issues. Id., 464-487. The unqualified nature of this assertion in what is generally recognized as the most prestigious maritime law journal in the United States, only emphasizes how common the practice is.

As to this court's stated concern for the needs for an "adversary proceedings" in which to adjudicate this issue, it can hardly be denied that a dispute over $1,900 satisfies any "case or controversy" requirement. Adversity can be augmented in a variety of ways. One way the court may have overlooked is ARCP 24(c) which expressly provides:

> "When the constitutionality of a state statute affecting the public interest is drawn in question in any action to which the state or an officer, agency or employee thereof is not a party, the court shall notify the attorney general of Alaska of such fact, and the state shall be permitted to intervene in the action."

The term "state statute affecting the public interest" is surely broad enough to include this Alaska Rule of Professional Conduct 1.8(e)(1), the constitutionality of which is in fact being drawn into question in this litigation.[3]

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[2] The latter authorizes loans of all kinds, not merely the humanitarian loans at issue here.

[3] Your undersigned views this issue as a question of "interpretation" of the Ak. Model Code 1.8(e)(1) language "expenses of litigation" to include advances of humanitarian living costs necessary to sustain a client during the pendency of litigation that arises out of an impairment to that client's natural ability to

(continued...)

If the state chooses to intervene in this matter, the state should, however, be put on notice that your undersigned's action in taking, to quote this court, a "challenge to this rule" is not being done for the recovery of the mere $1,900 remaining in dispute in this litigation.[4] The Attorney General (and its client,

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[3](...continued)
sustain himself (i.e., here the death of this minor child's father and natural supporter). But if the Alaska state authorities did not agree in this interpretation, that would certainly impair your undersigned in his representation of his client's paramount federal rights in which case the constitutionality of this rule is most certainly drawn into question in the face of United States Constitution Article III ¶2 which proscribes that the judicial power of the United States Supreme Court (not the states) shall apply "to all cases of admiralty and maritime jurisdiction", and further, Article VI which provides:

> "This Constitution and the laws of the United States which shall be made in pursuance there.... ***shall be the supreme law of the land..*** and ***the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary not withstanding.***" (underline; bold; italics added).

[4] This court can see from the record in this case that your undersigned's fee for this specialized work resulting in a settlement of $665,000 was over $200,000. Your undersigned just settled another maritime case, *Hanson v. North Star Terminal*, No. 3KO-94-730 CV (pending before Your Honor) for (continued...)

the Alaska Bar Association) should be well advised that if the state seeks intervention to ostensibly protect their view of the "public interest", this will expose the state to your undersigned's fees on a "public interest" basis for acting in a private Attorney General capacity in response.[5]

Regardless of what your honor decides, your undersigned feels he must ask that this court reconsider the language of its order suggesting he ask the Supreme Court to reexamine Ak. Prof. Code 1.8? The intent of that order is unclear. Lawyers, judges, and justices all swore the same oath to defend the same constitution. But judges are particularly bound thereby as the above emphasized US Constitutional language from Article VI clearly indicates. An appeal is a time consuming, expensive and drawn out affair which our system of justice does not require any citizen undergo to have a law either interpreted or declared invalid. This decision

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[4](...continued)
$635,000 earning him a similar fee. Your undersigned concluded four other cases of this magnitude (or greater) in 1995; and he could represent a similar number in 1996. He does not much care about the $1,900 but he will not countenance the enforcement of an arcane rule that does serious damage to his (and all other Alaskan attorneys) ability to represent tort victims in this situation merely because our court adopted a Model Ethics Code with no express allowance for loans of this nature.

[5] Despite a practice limited to the representation of serious maritime tort victims. Your undersigned is no stranger to public interest litigation; see *Markham v. F/V Borland Drive*, 741 F.Supp. 188 (D. Ak., 1989); *Mickens v. City of Kodiak*, 640 P.2d. 818 (Ak., 1982).

is committed in the first instance to this court. Compare *Churchill v. F/V FJORD*, 739 F.2d. 1395 (9th Cir., en banc 1984).

In the final analysis this court should rule on the meaning or invalidity of this rule for the same reason Judge Holland invalidated his court's own admiralty rules infringing on the prosecution of seamen's remedies in *F/V Borland Drive*. This court's interpretation of this existing bar rule to permit humanitarian loans or its declaration of invalidity will presumably be honored in all cases by the State.[6] And if your honor gives a reasoned decision why your undersigned's position is wrong, that too may end the matter.

It may well be that the Supreme Court will have to address the meaning or invalidity of this rule. But if so, that should only occur after it has the benefit of a learned trial judge's prospective as to the effect a literal interpretation of Code 1.8(e)(1) would have on the representation of poor tort victims.[7] Suffice it to say if your undersigned is prepared to risk a Bar sanction for violating this rule (on his client's behalf), he prays

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[6] Judge Holland submitted his opinion in *Borland Drive* for publication both to West and to the "*Bar Rag*". Both duly published it thereby giving the entire Bar the benefit of his ruling. Presumably the "*Bar Rag*" would publish this court's interpretation or declaration of invalidity of Rule 1.8(e)(1) if the state chose not to appeal, yet failed to change the rule.

[7] Merely because this court's opinions on issues of law are reviewed de novo is not to suggest they have no "weight" or value on an appeal (that may or may not follow). See *Churchill* Id., at 1400, 1405-06; compare *Alaska Food Inc. v. Amer. Mfr. Mut. Ins. Co.*, 482 P.2d. 842 (Ak., 1971).

this court too will clearly see its duty and expressly rule on both its view of the paramount maritime law and its interpretation of this rule in view of any ethical impropriety in fact that it sees in this conduct. Your undersigned further prays that it give its views without regard for the fact that this model rule was approved[8] by our Supreme Court (but only in its rule making capacity). Rules adopted by our justices can be as invalid as statutes adopted by learned lawyers elected to our legislature. Both are fallible. *Alaska Food*, supra, at 847.

No lawyer in the course of representing Alaska's poor can possibly avoid facing the plea of a client in a desperate situation. Regardless of how this court resolved that dilemma before she ascended to the bench, it's well past time that it be recognized in Alaska as it has in much of the country that there is no harm in loaning small amounts of money in this limited situation. On the contrary it is necessary if the poor are to receive equal justice. It's time those lawyers that have long recognized that fact be allowed to come out of the closet.

Respectfully Submitted this 23 day of May, 1996.
Gerald W. Markham
Attorney for Petitioner SH
Ak. Bar No. 7210058

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[8] Along with an entire code of rules. There is no suggestion in that adoption that our court ever directed its attention to this particular problem.

APPENDIX H

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA, THIRD JUDICIAL
DISTRICT AT KODIAK

IN THE MATTER OF THE MINOR CHILD
KARI ANNE HALSEY
d.o.b. 9/21/85
Case No. 3KO-93-55 PR

ORDER

IT IS ORDERED that on reconsideration, this court vacates its order of May 13, 1996, and rules Gerald Markham is entitled to receive reimbursement in full of his $6,625.00 expended on behalf of advances for humanitarian support to the family of this minor child to allow them to subsist during the pendency of the underlying settled litigation for the reasons expressed in the accompanying opinion. Petitioner's counsel is accordingly entitled to pay himself the full $4,950 remaining in his trust account.

DENIED.

DONE this 24th day of June, 1996.

Hon. Joan Woodward, Superior Court Judge

APPENDIX I

GERALD W. MARKHAM, Attorney at Law
424 Marine Way, Suite 205
Kodiak, Alaska 99615
(907) 486-4194 / fax: 486-5822
Attorney for Appellant Sandy Haase Halsey

IN THE SUPREME COURT
FOR THE STATE OF ALASKA
IN THE MATTER OF
THE MINOR CHILD
KARI ANNE HALSEY,
d.o.b. 9/21/85
Supreme Court Case No. _____
Superior Court No. 3KO-93-55 PR

NOTICE OF APPEAL

COMES NOW Sandy Haase Halsey Appellant (petitioner below), whose address is 3144 Scenic Dr., Oshkosh, Wisconsin 54904, and gives notices pursuant to Appellate rule 204(b) of taking an appeal from the orders of the Honorable Superior Court Judge Donald Hopwood dated October 19, 1993, and of the Honorable Superior Court Judge Joan Woodward dated May 13, 1996, reconsideration of which was denied in a June 24, 1996, order distributed June 25, 1996. Said orders became a "final judgment' under Appellate Rule 204(a)(3)[e] thirty (30) days from the time filing of Appellant's May 23, 1996, motion for reconsideration of the last order addressed to this issue. All orders appealed from are attached herewith. This appeal is taken to the Alaska Supreme Court.

DATED this 15 day of July, 1996.

Gerald W. Markham
Attorney for Appellant
(Petitioner below) Sandy Halsey
Ak. Bar No. 7210058

APPENDIX J
June 1, 1997 [excerpts from]
Appellant's Alaska State Supreme Court Brief

IN THE SUPREME COURT OF THE STATE OF ALASKA
In The Matter of the Minor Child:
K.A.H.
Supreme Court No. S-07761
BRIEF OF APPELLANT
Filed June 1, 1997.

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*

The case meanwhile proceeded toward a trial then scheduled (over Defendants' objections seeking "more time") for November, 1995.

A mediation was finally agreed to be held on October 6, 1995, before Douglas J. Serdahely, former Presiding Superior Court Judge of the Third Judicial District. His affidavit reflects that SH's counsel at that mediation succeeded in raising the settlement offers to KAH from $175,000 to $665,000,[34] and that Defendant's

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[34] By that time Defendants' counsel had expended $335,000 in "defense costs" making this arguably a (primarily) "policy limits" settlement. Primary policy limits were $1 million ($4 million excess); see R 121 pg. 13 ¶17. However, virtually all marine "Protection & Indemnity" policies provide "defense costs" come off policy limits (sometimes called "self-cannibalizing" policies). The "leverage" such a policy has on a settlement is obvious (particularly when "defense" costs are $325,000 before a case goes to trial)! Perhaps not so obvious (but present) is the conflict of interest such provisions create for defense counsel. The legal validity of such a provision has modernly been

(continued...)

threats of "delay" were a major factor in his recommendation that this final offer be accepted. (R 121, Plaintiff's confidential affidavit, Ex. A; Serdahely Affidavit, Para. 6.)

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What then "changed" one wonders, to prompt the American Bar Association ethics committee in January, 1955, to issue "advisory" ethics opinion No. 288; see 41 ABA Journal 33 (Jan., 1955) which appears to have thrown down the modern gauntlet to World War II over this issue? One is challenged by the question, but will find no answers in that ABA opinion or in the immediate response found in Ratner,[48] *Advancing Money to Clients -- Whether Unethical*, 15 NACCA Law

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[34](...continued)
challenged in a number of areas. Compare *Planet Ins. Co. v. Mead Reinsurance Co.*, 789 F.2d. 668 (9th Cir., 1986); *Grunewald & Adams Jewelers v. Lloyds of London*, 700 P.2d. 888 (Az. App., 1979); but see *Helfand v. National Union Fire Ins. Co.*, 13 Cal. Rptr. 2d. 295 (Cal. App. 1st, 1992). This principal was a major reason the case described in *In Re.: St. Patrick, Consolidated Cases*, 43 F.3d. 1322 (9th Cir., 1995), didn't settle.

[48] Payne H. Ratner, president of NACCA and former governor of Kansas. For the benefit of those who were not even in law school then, NACCA (National Assoc. of Claimants Compensation Attorneys) was by then 15 years old. This organization changed its name in 1968 to the American Trial Lawyers Association (ATLA). At the time of Ratner's article the editor in chief of the NACCA Law Journal was Roscoe Pound, formerly Dean of Harvard Law School.

Journal 410 (May, 1955), which authoritatively picked the gauntlet up, and slapped its challenger aside the face!

In the immediate aftermath of these directly conflicting opinions from what was by then two opposing National Bar Associations, we see decision such as *State v. Dawson*, 111 So.2d. 427, (Fla., 1959), which although seeming oblivious to the festering controversy (or prior case law),[49] nonethel ss reaching the same conclusion as these early 20th Century cases. But see *El Jenny v. Cleveland Tankers*, 209 F.Supp 91 (N.D., Ind., 1962).

Quite obviously the issue in *Dawson* was not loans, but solicitation (specifically "runners" and "ambulance chasing"),[50] which the Supreme Court soon addressed in *NAACP v. Button*, 371 US 415, 83 S.Ct. 328, 9 L.Ed.2d. 405 (1963), followed by a series of cases involving union associational aid in securing legal representation beginning with *Railroad Trainmen v. Virginia Bar*,[51] 377 US 1, 84 S.Ct. 1113, 12 L.Ed.2d.

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[49] See also *In Re.: Moore*, 134 NE.2d. 324, 328 (Ill., 1956), seemingly oblivious to even its own precedent, McCallum, supra, on the subject. Compare Note, *Attorney & Client, Advancements to Clients Not Solicitations Where Attorney's Motive is Proper*, 6 De Paul L.Rev. 148 (1956).

[50] See *In Re.: Sandifer*, 198 SE.2d. 120 (SC., 1973); compare *Berger v. State, Dept. of Revenue*, 910 P.2d. 581 (Ak., 1996).

[51] See also *United Mine Workers v. Illinois Bar Assoc.*, 389 US 217, 88 S.Ct. 353, 19 L.Ed.2d. 426 (1967), and *United Transportation Union v. Michigan Bar*, 401 US 576, 91 S.Ct. 1076, 28 L.Ed.2d. 339 (1971), discussed infra.

89, 11 ALR 3rd. 1196 (1964), and (presumably) resolved in the companion cases of *In Re.: Primus*, 436 US 412, 98 S.Ct. 1893, 56 L.Ed.2d. 417 (1978), and *Ohralik V. Ohio State Bar Assoc.*, 436 US 447, 98 S.Ct. 1912, 56 L.Ed.2d. 444, (1978),[52] insofar as direct solicitation outside of group activity was concerned. However, before *Button* and *Trainmen* were decided, the battle over loans (at best suggestive of solicitation?), went "nuclear" when not long after ABA ethic opinion No. 288 (not coincidentally) a number of prominent NACCA members came under some indiscriminate disciplinary action for engaging in a combination of union solicitation, "humanitarian" loans, and zealous advocacy typical of labor attorneys throughout this century.

Central to the understanding of this modern controversy as it pertains to this appeal are the Ruffalo cases[53] which are illustrative of this basic

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[52] But see Pulaski, *In Person Solicitation and the First Amendment: Was Ohralik Wrongly Decided*? 11 Ariz. St. LJ 23 (1979); see also *Zauderer v. Office of Disciplinary Counsel*, 471 US 626, 105 S.Ct. 2265, 85 L.Ed.2d. 652 (1985); *Shapero v. Kentucky Bar Assoc.*, 486 US 466, 108 S.Ct. 1916, 100 L.Ed.2d. 475, (1988), and *Florida Bar v. Went For It, Inc.*, 515 US ___, 115 S.Ct. 2371, 132 L.Ed. 541, 561 (Kennedy Dissenting, 1995).

[53] *Mahoning County Bar Assoc. v. Ruffalo*, 199 NE.2d. 396, 8 ALR 3rd 1142 cert den 379 US 931 (1964); *In Re. Ruffalo*, 249 F.Supp. 432, 440 - 443, 445 (ND., Ohio, 1965); *In Re.: Ruffalo*, 370 F.2d. 447, 461 (6th Cir., 1966, Edwards dissenting), rev'd. *In Re.: Ruffalo*, 390 US 544, 88 S.Ct. 1222, 20

(continued...)

ongoing policy controversy between NACCA (ATLA) and the more conservative ABA. As significantly noted in *In Re.: Ruffalo*, 249 F.Supp. 432, 436-438, the real impetus behind the ABA absolute prohibition of humanitarian "loans" was the Association of American Railroads "caught" in industry speeches asserting that it had obtained the confidence of a number of Bar Associations and convinced them that putting an end to attorney loans was "more in their interests than ours".[54]

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[53](...continued)
L.Ed.2d. 117 (1968). The Supreme Court effectively "ducked" the loan to clients issue and found an alternative ground by which to effect a form of "equity" for *Ruffalo* for its perhaps precipitous denial of certiorari in *Mahoning County Bar*, supra (particularly in the face of stubborn resistance in the other federal courts' cases that followed). *Ruffalo*'s counsel (including Prof. Charles Alan Wright of the Univ. of Texas; see 370 F.2d. 447, 448) demonstrated great ingenuity and tenacity in this collateral method of achieving Supreme Court reconsideration of *Ruffalo*'s claim and his right to practice in federal court pending a reversal and rehearing on remand (which never occurred). While Ruffalo's (FELA) clients still had a forum (for the attorney of their choice), what of their 45 USCA §56 FELA rights to select a state forum? See argument, pg. 31-32, infra.

[54] These "tort reform" forces continue to be active today. They sleep lightly, and awaken violently at the slightest bite from creatures whom nature put on this earth (essential to these forces' success), yet which are provided no other means of nourishment. Compare
(continued...)

Nearly simultaneously the Kansas Supreme Court addressed the issue in an action to disbar the very eminent author of the scholarly NCCAA Law Reporter article, supra, that dared challenge the ABA (and its railroad support)! *In Re. Ratner*, supra. Largely in reliance on *Trainmen*, supra, the Kansas Supreme Court exonerated its former Governor of any impropriety and like the US District Court in *Ruffalo*, supra, issued a blistering attack on the practices of the railroad's adjusters involved in the process! Id., at 876. An exceedingly scholarly article, Strelon, *Loans to Clients*, 55 Cal. L.Rev. 1419 (1967), followed objectively addressing the issue[55] and appears to have been the impetus for the California rule expressly permitting loans.

But as clairvoyantly predicted by concurring Judge Smith in *Dombey, Tyler, Richards & Grieser v. Detroit T&I R. Co.*, 351 F.2d. 121, 131 (6th Cir., 1965), the "war" over "humanitarian" loans was not ended by *Trainmen*, because many Bars and courts refused to accept it. As he so properly summarized:

> "At issue is the entire area of the legal representation of injured employees who seek recompense

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[54](...continued)
Gallick v. Baltimore and Ohio Railroad Co., 372 US 108, 83 S.Ct. 659, 9 L.Ed.2d. 618 (1963). When awakened these forces react by spraying the entire neighborhood? They care not for nature's "balance".

[55] See also, Anno., *Validity & Propriety of Arrangements by Which Attorneys Pays or Advances Expenses of Clients*, 8 ALR 3rd. 1155, 1176 ¶6 (1966), similarly reaching the conclusion that post-retention loans to clients are proper.

> for their injuries. At war are two conflicting interests: injured employee and his lawyer, seek the maximum recovery. The employer and his claims agents seek the minimum."

On the heels of *Ruffalo*, *Ratner* and *Dombey* (as predicted by Judge Smith) the failure to abide by the "spirit" as well as the letter of *Trainmen* evoked a scathing Supreme Court response when the Michigan Supreme Court upheld a lower court injunction which directed a union to refrain from:

> "Stating or suggesting that a recommended lawyer will defray expenses of any kind or make advances for any purpose to such injured persons or their family pending settlement of their claim."

In his responsive concurrence in *United Transportation Union*, supra at 28 L.Ed.2d. 339, 353, (to which no member of the Court took exception) Justice Harlan (generally the court's most conservative member during this era), echoed the observation in *Ratner* (and earlier FELA precedent) stating:

> "It is not generally improper for an attorney to make advances to clients; it is considered improper for him to use the fact that he makes them as a drawing card in an effort to secure professional employment."

The "holding" of *United Transportation Union* reversed an injunction directed to a union, not the attorneys involved. Accordingly if one still felt bound only to the letter rather than the "spirit" of *Trainmen* (despite *United Transportation Union*), one might still argue that no Bar Association or court has yet been precluded from sanctioning <u>attorneys</u> for making humanitarian loans (even though a union may not be enjoined from

"speaking" about them)? But if that were the extent of *United Transportation*, why would Justice Harlan go out of his way to endorse the underlying conduct of such attorneys as well?[56] Contrary to the suggestion of Pulaski, *In Person Solicitation*, supra at 25-26, the answer cannot be characterized as mere "policy differences" between the Supreme Court and the ABA (and those jurisdictions that "blindly" adopt its precepts) when the effect is the impairment of paramount federally guaranteed rights. Both *Ratner*, supra, and dissenting Judge Edwards in *In Re.: Ruffalo*, 370 F.2d. 447, 461 (6th Cir., 1966), speak to that proposition in reliance on *Trainmen*.

As much as SH might like to come within the constitutional protections of the First Amendment, alternative and perhaps more appropriate grounds for protecting the "conduct" at issue here was articulated in *Louisiana State Bar Ass'n. v. Edwins*, 329 So.2d. 437, 446 (La., 1976), involving loans to the FELA "step-child" (the generally non-union) seamen. *Edwins* recognized that the denial of a lawyer's rights to provide "humanitarian aid" to seamen threatened to "unreasonably inhibit the enforcement of a federal statutory right" and also their right of free access to

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[56] The distinction between "speech" and "expressive" conduct is a fine one that despite having handled one of the more controlling ("workers' rights") case on this issue in this state, *Mickens v. City of Kodiak*, 640 P.2d. 818 (Ak., 1982), SH's counsel still feels somewhat less than confident authoritatively addressing (as these rights are not SH's counsel's primary "area" of practice).

the courts under the Louisiana Constitution.[57]

Katchatag, supra, further recognized *McAlpine*'s rule making power over attorney's fees must yield to paramount federal law (there an FTCA statutory 25% fee). This court has further acknowledged the broader Congressional purpose behind the Jones Act may nullify state efforts impeding this "special" class of workmen's rights. *Brown v. State*, 816 P.2d. 1368 (Ak., 1991). Courts since *Trainmen* and *United Transportation Workers* have recognized that attorneys play an essential role in protecting these workmen's federal rights, and that these attorneys may not be unduly restricted by State Bar "ethical" rules in their efforts. *Norfolk Southern Ry. Co. v. Thompson*, supra. *Woodrum v. Southern Ry. Co.*, 750 F.2d. 876 (11th Cir., 1985); *Hendley v. Central of Georgia R. Co.*, 609

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[57] *Edwins* predated *Bounds v. Smith*, 430 US 817, 824, 97 S.Ct. 1491, 52 L.Ed.2d. 72 (1977), which expressly recognized a federal constitutional duty on states to not impede, and actually aid state residents access to federal courts to enforce their federal civil rights. Compare *Lewis v. Casey*, ___ US ___, 116 S.Ct. 2174, 135 L.Ed. 606, 628 (1996, Thomas, concurring), and 652 (Stevens dissenting), debating the source of this right. As in *Edwins* there similarly appears to be no express Constitutional Right of Access to the Alaska State Courts, but that does not mean one does not exist. Compare *Gonzales v. Safeway Stores*, 882 P.2d. 389, 398 (Ak., 1994), with *Simeson v. Canales*, 806 SW.2d. 802 (Tx., 1991), and *Decker v. Lindsay*, 824 SW. 2d. 247 (Tx. App., 1992). One source in addition to the Alaska Guarantee of Free Speech and Due Process) is Alaska Const., Art. IV §1; see *Citizens Coalition v. McAlpine*, 810 P.2d. 162 (Ak., 1991).

F.2d. 1146 (5th Cir., 1980); *Sheet Metal Workers Intern v. Burlington Northern*, 736 F.2d. 1250 (8th Cir., 1984); *Tucker v. Norfolk & Western Railway Co.*, 849 F.Supp. 1096 (E.D. Va., 1994). See also *Rand v. Mansanto*, 926 F.2d. 596, 600 (7th Cir., 1991), and *Boccardo v. CIR*, 56 F.3d. 1016, 1019 (9th Cir., 1995). Compare *Stack v. Chicago M. St. P&P R. Co.*, 615 P.2d. 457 (Wa., 1980).

One wonders how a state could more effectively close its doors to the effective enforcement of these special federal workers' remedies than to proscribe that those persons who are truly most competent to bring these claims (and evaluate their worth as collateral) are barred from appearing in its courts by virtue of these attorneys' time-honored practice of loaning clients modest sums when they become impoverished during the inevitable delays necessary to the prosection of their claims? [58]

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[58] It is no "answer" to such an argument to suggest that (some) courts have delay reducing procedures (i.e., fast track). Many (most) FELA / Jones Act cases may well not be suffering delay solely due to court calendar congestion or their employer's (insurance carrier's) dilatory tactics. Many claims (PKH's here specifically) are "delayed" for reasons inherent to the "truth seeking" process such as the temporary absence of witnesses, the discovery or development of evidence, or medical instability which occasion the workman's own counsel to delay so that he may more effectively prosecute these rights. But the reason for this delay is inconsequential to the victim. It is not the inevitable delay that necessarily impacts the remedy. Rather it is the ethically imposed prohibition preventing the FELA / Jones Act attorney the simple expedient of a small

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It is important to keep in mind in this regard that Congress has expressly mandated that the FELA / Jones Act worker has an absolute right to insist his cause proceed in his state ("home town") court (before a "true" jury of his peers) which the usually urban federal courts cannot often effectively provide these frequently rural workmen. 28 USCA §1445(a) and 45 USCA §56. *Miles v. Illinois CR Co.*, 315 US 698, 706, 62 S.Ct. 827, 86 L.Ed. 1129, 1135 62 S.Ct. 827 (Jackson concur, 1942). See also *Gamble v. Central of Georgia Railway Co.*, 486 F.2d. 781 (5th Cir., 1973), modified in *Lirette v. NL Sperry Sun, Inc.*, 820 F.2d. 116 (5th Cir., 1987). That right is to be distinguished from each state's right to proscribe rules rejecting FELA/Jones Act claims that have no reasonable relationship to it whatsoever. *American Dredging v. Miller*, 510 US 443, 114 S.Ct. 981, 127 L.Ed.2d. 285 (1994); *Hughes v. Foster Wheeler Co.*, 932 P.2d. 784 (Ak., 1997), pet. for cert. filed __ USLW __ (1997).

In view of the recent expression of the three (then) members of this court deciding *Hughes*, it would be presumptuous of SH (a litigant who would typically benefit from this holding) to exhaustively brief why this "extension" of Alaska's "enlightened" ARCP 82 award of attorney fees is (regrettably) likely to be a "bridge too far" for the current "strict constuctionalists" major-

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[58](...continued)
loan so that the workman does not have to settle his federal right to compensation for a lifelong injury to be able to pay next month's rent!

ity on the Supreme Court.[59] Conversely this court should not feel constricted by its recent precedent in *Hughes* from invalidating any possible ARPC 1.8(e) prohibition on humanitarian loans to this seaman's family. On the contrary, *Hughes* at 790 acknowledges

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[59] *Hughes* fails to note that the result in *American Dredging* was preordained for that court, not by "material prejudice to national uniformity" analysis, but by the "pole star" of strict construction, and as *American Dredging* indicated at 127 L.Ed.2d. 285, 298, by *Missouri ex. rel. Southern RR Co. v. Mayfield*, 340 US 1 5, 71 S.Ct. 1, 95 L.Ed. 3 (1950), and the desire to harmonize the result under FELA and the Jones Act which adopts it by reference. Compare the analysis in *Miles* supra, 112 L.Ed.2d. 275, 293-294. See a different approach described in Gilmore & Black, supra, at pg. 351-352, and *Cox v. Roth*, 348 US 207, 75 S.Ct. 242, 99 L.Ed. 260 (1955). SH is hard-pressed to see how such a court would not similarly apply the truly "arcane" holding of *Monessen Southwestern Railway Co. v. Morgan*, 486 US 330, 108 S.Ct. 1837, 100 L.Ed.2d. 349 (1988) to the Jones Act? *Monessen* would also seem to require invalidation of a state rule that proscribes a virtually mandatory award of attorney's fees amounting to (generally) a 10% increase in the judgment (in the face of a proclaimed "national" rule to the contrary) in at least these federal statutory causes of action? Compare *Soseboe v. Roth*, 893 F.2d. 54 (3rd. Cir., 1990); *Temple v. Chris Craft*, 770 F.2d. 245 (1st Cir., 1985) cert den 474 US 1021 (1985); *American Nat. Fire Ins. Co. v. Kenealy*, 72 F.3d. 264, 270 (2nd Cir., 1995); *Goran Inc. v. M/V Aivak*, 907 F.Supp. 397 (S.D. Fla., 1995); *Kalmback Inc. v. Ins. Co. of State of Pa., Inc.*, 422 F.Supp. 44 (D. Ak., 1976).

that the former "procedural" (remedial) analysis applied in *Williams v. Eckert*, 643 P.2d. 991, 997 (Ak., 1982) often reaches incorrect results. As described in *Markham v. Borland Drive*, supra at 190, such "rules":

> "Though concededly 'procedural' may be of as great importance to litigants as many a 'substantive' doctrine."

Modernly (in this context) the relevant analysis is rather whether the a state's "rule":

> "...works material prejudice to the characteristic features of the general maritime law." *Hughes* at 787.

As SH's counsel predicted below on February 1, 1996 (R 172 Fn. 12), the recent holdings of *Glynn v. Roy Al Boat Mgt. Corp.*, 57 F.3d. 1495 (9th Cir., 1995), and *Guevara v. Maritime Overseas Corp.*, 59 F.3d. 1496 (5th Cir., en banc, 1995), interpreting *Miles*, supra, probably sounded the death knell for *Weason v. Harville*, 706 P.2d. 306, 310 (Ak., 1985).[60] Even pre-Glynn shortly after the passage of the Fishing Safety Act of 1988, fishermen throughout the United States were systematically forced (at the insistence of the fishing insurance industry) to sign unilaterally written employment agreements which provided for an

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[60] See this court's (perhaps precipitous) "leap" to reverse *Weason* (to reach a "right" result) in *Stone v. International Marine Carriers*, 918 P.2d. 551, 556 (Ak., 1996). Given the clear incompetence of the "seaman's" counsel handling *Stone*, it's doubtful that the remaining comprehensive arguments supporting the continued validity of *Weason*'s "supplemental" general maritime law remedy (ala *Hughes*) was effectively put forth in that case?

inadequate maintenance rates of $15 - $20 per day.[61] The combined effect will put even more pressure on seamen's counsel to loan. [62]

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[61] ATLA's select committee on HB 1841 (discussed supra pg. 4 Fn. 6) did not foresee the potential for the apparently innocuous provision (now 46 USCA §10601) to be used as a "weapon" to return fishermen to their 1950's status in this regard described in Gilmore & Black, *Law of Admiralty* 2d. (1975) pg. 307. Non-union seamen have no ability to understand let alone economically resist this "contractual" term which essentially abrogates cases like *Weason* in which $50/day was awarded based on proof of actual living costs in Kodiak. The issue of the validity of such contracts is still an open one. Compare *Gardiner v. Sealand Services*, 786 F.2d. 943 (9th Cir., 1986); and *Barnes v. Andover Co. LP* 900 F.2d. 630 (3rd Cir., 1990). But given *Glynn*, *Guevara* and *Stone* and the non-union status of seamen, the economic incentive for any Alaskan attorney to press this challenge is now a nearly impossible "long shot".

[62] Which is coincidentally a practical reason why courts should approve the practice. Seamen's maintenance claims can be brought "seriatim"; see *Pellotto v. L&N Towing*, 604 F.2d. 395 (5th Cir., 1979). In view of *Stone* and the literal language of ARPC 1.8(e), attorneys will have no "ethical" choice but to repeatedly bring maintenance actions during the development of Jones Act causes if they are not permitted the alternative expedient of a modest loan. Since state liability law cases do not have this "luxury" (?), they will undoubtedly be filed earlier and rushed to trial (frequently prematurely). The effect of these

(continued...)

On the contrary these modern holdings most assuredly invoke Justice Story's ancient justification for the maritime law doctrine of "special solicitude" to this class of "poor", friendless (and intemperate) workmen. *Barnes* supra, at 636-637. Call this "ethical" prohibition what you will; its effect will obviously be to "work a material prejudice" on the indigent seaman's (and his surviving family's) rights to just compensation under the maritime law. It is for these and a variety of similar reasons that in America's most prestigious

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[62](...continued)
premature filings and premature trial dates will be court congestion and "injustice" due to inadequate discovery. Compare the Anchorage experience with "fast track" which will suffer a long deserved death on August 7, 1997. Compare also *Gonzalez*, supra, *Dean v. Firor*, 681 P.2d. 321, 326 (Ak., 1984), (and *Geil v. PJ Ventures*, Supreme Court Case No. S7049, Order of June 2, 1995), wherein this court demonstrated its willingness to countenance "client" financed alleviation of court congestion by the appointment of expensive private discovery masters (that only well-financed PI counsel and insurance companies can afford). Surely an indigent's attorney's (limited) funds could be at least as well "spent" by lending his client the money to live while a constitutionally appointed jurist decides his client's case as the court system's calendar permits (and as at least public perception of the legal system envisions). Justice delayed is not always justice denied when the option is too little discovery to prove a case compounded by a rush to justice (frequently before a private master). Conversely surgical discovery has been historically proven to settle cases (justly) particularly when "smoking guns" establishing liability are found.

maritime law review, one finds respected maritime practitioners such as Edington, *Ethics at Sea* 70 Tulane LR 415, 466 (1995) (in the face of MPC 1.8(e)), nevertheless unabashedly suggesting that loans are commonplace[63] when he unequivocally states:

> "In litigation cases the lawyer may advance fees on a contingent fee case or make a loan to a client which will be paid out of any recovery." [underline added]

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[63] A comment expressly made (i.e., everybody is doing it") in the Jones Act case of *Shea v. Virginia State Bar*, 374 SE.2d. 63 (Va., 1988) (to no avail). As counsel for SH testified below (in maritime cases at least), everybody is doing it. See R 181 Para. 3. In his professional opinion based on 25 years of practice of law in Alaska (20+ in Kodiak devoted almost exclusively to representing Jones Act seamen's injury and death claims), judicious "loans" made either directly by the seaman's attorney or by third persons premised on a guarantee of repayment to be withheld from the seaman's recovery by the seaman's attorney are essential to the survival of many Alaskan fishermen and their families until the "true" value of their cases can be realized near or at trial.

APPENDIX K
Ak. Supreme Court 11/20/96 Order
Directing Alaska Bar Assoc.
to File Amicus Curiae Brief

IN THE SUPREME COURT OF THE STATE OF ALASKA
In The Matter of the Minor Child:
K.A.H.
Supreme Court No. S-07761
ORDER
Date of Order: 11/20/96
Trial Court Case # 3KO-93-00055CP

Before: Compton, Chief Justice, and Rabinowitz, Matthews, Eastaugh, and Fabe, Justices

IT IS ORDERED SUA SPONTE:

1. The trial court record has been numbered and Appellant's brief and excerpt of record are now due on or before December 23, 1996.

2. Bar Counsel is requested to enter an appearance amicus curiae and file a responsive brief to the issues in this appeal involving Professional Conduct Rule 1.8. The clerk shall provide to Bar Counsel a copy of the court's file and such parts of the trial court files as Bar Counsel deems necessary. The clerk shall notify Bar Counsel when the responsive amicus curiae brief is due.

3. Appellant shall serve all future pleadings on Bar Counsel at P O Box 100279, Anchorage, AK 99501

Entered by direction of the court at Anchorage, Alaska on November 20, 1996.

CLERK OF THE SUPREME COURT
Jan Hansen

APPENDIX L
Authorities Relied Upon

United States Constitution

Article III

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§2. Jurisdiction. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and... to all cases of admiralty and maritime jurisdiction...

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Article VI.
Debts; Supremacy; Oath.

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This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

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Article XIV.

§ 1. Citizenship Rights Not to Be Abridged by States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment I: Freedom of Speech, and of the Press.
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

28 USCA §1257 State Courts; Certiorari
(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 USCA §1333, Admiralty, Maritime and Prize Cases
The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
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45 USCA §55. Contract, Rule, Regulation, or Device Exempting From Liability; Set-off

Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void;

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45 USCA §56. Actions; limitations; Concurrent Jurisdiction of Courts.

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Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 USCA §60. Penalty for Suppression of Voluntary Information Incident to Accidents; Separability of Provisions.

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void....

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46 USCA §688(a). Recovery for Injury to or Death of Seaman.

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Alaska Statute 22.05.010. Jurisdiction.

(a) The supreme court has final appellate jurisdiction in all actions and proceedings. However a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court.

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Alaska Statute 22.10.020. Jurisdiction of the Superior Court.

(a) The superior court is the trial court of general jurisdiction, with original jurisdiction in all civil and criminal matters, including probate and guardianship of minors and incompetents....

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(b) The jurisdiction of the superior court extends over the whole of the state.

United States Supreme Court Rule 10.
Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned by such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

United States Supreme Court Rule 13.
Review on Certiorari: Time for Petitioning

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

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3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment. A suggestion made to a United States court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of this Rule unless so treated by the United States court of appeals.

Alaska Rules of Appellate Procedure, Rule 202. Judgments From Which Appeal May Be Taken.

(a) An appeal may be taken to the supreme court from a final judgment entered by the superior court, in the circumstances specified in AS 22.05.010.

(b) An appeal may be taken to the court of appeals from a final judgment entered by the superior court or the district court, in the circumstances specified in AS 22.07.020.

Alaska Civil Rule 90.2:
Settlement and Judgments in Favor a Minor.

(a) Approval of Settlement of Claims on Behalf of Minors.

(1) ***Approval.*** A parent or guardian of a minor who has a claim against another person has the power to execute a full release or a covenant not to sue, or to execute a stipulation for entry of judgment on such claim. However, before such a document is effective, it must be approved by the court upon the filing of a petition or motion.

(2) *Petition or Motion.* A petition or motion for court approval of a minor's settlement under this rule must state the date of birth of the minor, the relationship between the moving party and the minor, the circumstances giving rise to the claim, the amount of any applicable liability insurance, and the basis for determining that the settlement is fair and reasonable. If the settlement arises from personal injuries to the minor, the petition or motion must describe the extent of the injuries, the medical treatment provided and the probable future course of treatment. If the settlement arises from the wrongful death or injury of another person, the petition or motion must describe the relationship between the other person and the minor and state whether the amount of the settlement is consistent with applicable state law.

(3) *Attorneys' Fees and Costs.* The court shall approve any attorneys' fees and costs that are to be paid from the settlement proceeds when the minor claimant is represented by counsel.

(4) *Hearing.* The court may approve the minor's settlement without a hearing if the settlement proceeds after attorney's fees and costs are deducted, do not exceed $25,000. When a hearing on the petition or motion is held, the court may require the presence of any person that has information concerning the minor's claim, the fairness of the settlement or any related matter.

(5) *Termination of Minor's Rights.* No instrument executed under this rule is effective to terminate a minor's interests until such funds are paid as directed by the court.

(b) Disbursement of Proceeds.

(1) *Order Directing Payment of Expenses, Costs and Fees.* The court shall order that reasonable expenses (medical or otherwise, including reimbursement to a parent, guardian or conservator), costs and attorney's fees be paid from the settlement.

(2) *Disposition of Remaining Balance.* The court shall order that the remaining balance of the settlement, including any future payments, be disposed of in a manner which benefits the best interests of the minor. Dispositions which may be allowed include:

(A) ordering the settlement to be held by a parent or guardian for the benefit of the minor if the remaining balance of the settlement does not exceed $10,000;

(B) ordering that a formal trust be established for the benefit of the minor;

(C) ordering the appointment of a conservator to hold the proceeds of the settlement for the benefit of the minor;

(D) ordering that the proceeds of the settlement be deposited in a federally insured financial

institution in an account from which withdrawal is not permitted without authority of the court; or

(E) ordering that the proceeds of the settlement be transferred to a custodian for the benefit of the minor under the Alaska Uniform Transfers to Minors Act (commencing with AS 13.46.010).

(3) *Standards for Disbursement of Proceeds.* The person or institution with authority under subparagraph (b)(2) may authorize disbursement of the settlement proceeds:

(A) for the support and education of the minor if the settlement proceeds are the result of the death or disability of another person;

(B) for the medical bills, special education or other costs related to the minor's injuries if the settlement proceeds are the result of injuries to the minor; of

(C) for any payment in the best interests of the minor after consideration of the benefit to the minor, the resources of the parents or guardian, and the amount of remaining settlement proceeds.

(c) Probate Master. A master appointed to hear probate proceedings has the authority under this rule to:

(1) conduct the hearing set forth in paragraph (a)(4) and recommend to the court that the settlement be approved;

(2) receive proof that the proceeds have been disposed of as set forth in subparagraph (b)(2); and

(3) issue orders approving the withdrawal of funds pursuant to subparagraph (b)(2)(D).

(d) Disbursement of Proceeds Resulting from Judgement. Proceeds resulting from a judgment in favor of a minor must be disbursed as set forth in paragraph (b).

Hoffman, Fifty Resolutions in Professional Deportment (1836)

XXIV

I will never be tempted by any pecuniary advantage however great, nor be persuaded by any appeal to my feelings however strong, to purchase, in whole or in part my client's cause. Should his wants be pressing, it will be an act of humanity to relieve them myself, if I am able, and if I am not, then to induce others to do so. But in no case will I permit either my benevolence or avarice, his wants or his ignorance, to seduce me into any participation of his pending claim or defense. Cases may arise in which it would be mutually advantageous thus to bargain, but the experiment is too dangerous, and my rule too sacred to admit of any exception, persuaded as I am that the relation of client and counsel, to be preserved in absolute purity, must admit of no such privilege, however guarded it may be by circumstances; and should the special case alluded to arise, better would it be that my client should suffer, and I lose a great and honest advantage, than that any discretion should exist in a matter so extremely liable to abuse, and so dangerous in precedent.

And though I have thus strongly worded my resolution, I do not thereby mean to repudiate, as wholly inadmissible the taking of contingent fees-- on the contrary, they are sometimes perfectly proper and are called for by public policy, no less than by humanity. The distinction is very clear. A claim or defense may be perfectly good in law, and in justice, and yet the expenses of litigation would be much beyond the means of the claimant or defendant-- and equally so as to counsel, who, if not thus contingently compensated in the ratio of the risk, might not be compensated at all. A contingent fee looks to professional compensation only on the final result of the matter in favor of the client. None other is offered or is attainable. The claim or defense never can be made without such an arran-

gement; it is voluntarily tendered, and necessarily accepted or rejected, before the institution of any proceedings.

It flows not from the influence of counsel over client, both parties have the option to be off; no expenses have been incurred; no moneys have been paid by the counsel to the client; the relation of borrower and lender, of vendor and vendee, does not subsist between them-- but it is an independent contract for the services of counsel to be rendered for the contingent avails of the matter to be litigated. Were this denied to the poor man, he could neither prosecute nor be defended. All of this differs essentially from the object of my resolution, which is against purchasing, in whole or in part, my client's rights, after the relation of client and counsel, in respect to it, had been fully established -- after the strength of his case has become known to me -- after his total pecuniary inability is equally known -- after expenses have been incurred which he is unable to meet -- after he stands to me in the relation of a debtor and after he desires money from me in exchange for his pending rights. With this explanation I renew my resolution never so to purchase my client's cause, in whole or in part; but still reserve to myself, on proper occasions, and with proper guards, the professional privilege (denied by no law among us) of agreeing to receive a contingent compensation freely offered for services wholly to be rendered, and when it is the only means by which the matter can either be prosecuted or defended. Under all other circumstances, I shall regard contingent fees as obnoxious to the present resolution.

Alabama Code of Ethics (1887) §38:

Business Dealings with the Clients. Attorneys should, as far as possible, avoid becoming either borrowers or creditors of their clients; and they ought scrupulously to refrain from bargaining about the subject matter of their litigation, so long as the relation of attorney and client continues.

ABA (1908) Cannon 10. Acquiring Interest in Litigation. The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

ABA (1908) Cannon 13. Contingent Fees. Contingent fees, where sanctioned by law, should be under the supervision of the Court in order that clients may be protected from unjust charges.

ABA (1908) Cannon 15. How Far A Lawyer May Go in Supporting a Client's Case. Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the

judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicane. He must obey his own conscience and not that of his client.

ABA (1928) Cannon 42. Expenses: A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as matter of convenience, but subject to reimbursement.

ABA Model Code DR 5-103. (1969)
Avoiding Acquisition of Interest in Litigation.

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses;

(2) Contract with a client for a reasonable contingent fee in a civil case.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

MPC 1.8(e): ABA Kutak Commission (1982 draft): Conflict of Interest: Prohibited Transactions

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A lawyer may advance court costs, expenses of litigation, and reasonable and necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

MPC 1.8(e): ABA (1983)

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Alaska Rules of Professional Conduct: Rule 1.8(e) Conflict of Interest: Prohibited Transactions.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

Roscoe Pound Foundation, American Trial Lawyer's Code of Conduct §5.6 (1982)

A lawyer shall not give money or anything of substantial value to any person in order to induce that person to become or to remain a client, or to induce that person to retain or to continue the lawyer as counsel on behalf of someone else. however, a lawyer may (a), advance money to a client on any terms that are fair; (b), give money to a client as an act of charity;

(c), give money to a client to enable the client to withstand delays in litigation that would otherwise induce the client to settle a case because of financial hardship, rather than on the merits of the client's claim; or

(d), charge a fee that is contingent in whole or in part on the outcome of the case.

COMMENT (EXCERPT):

> Rule 5.6(c) permits a lawyer to give money to a client to enable the client to have access to the legal system or to withstand delay as a form of coercion to settle on unfavorable terms not related to the merits of the case. A not uncommon practice is revealed, for example, in *Abramson v. Kenwood Laboratories, Inc.*, 223 NYS.2d. 1105 (1961). There the attorney "frankly stated in the course of the... pretrial hearings that he is 'running a business'. He indicated the generally known policy of his insurance carrier to offer payments in settlements of person injury suits of sums less than what may reasonably be anticipated as the probable recovery upon trial."

ILLUSTRATIVE CASES:

5(A). A lawyer represents the widow of a railroad employee killed in a switching accident; the railroad is the defendant. After many months, the case is near trial, but the plaintiff tells the lawyer that she urgently needs money for food and rent, and must therefore settle immediately for whatever she can get. The lawyer reasonably believes that she will receive substantially more in settlement on the eve of the trial or as a result of jury verdict. He therefore gives her money, with the understanding that she will pay it back only if there is a recovery in the case. The lawyer has not committed a disciplinary violation.

Supreme Court, U.S.
FILED
JUL 2 1999
CLERK

No. 98-1920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

IN THE MATTER OF THE MINOR CHILD K.A.H.
D.O.B. 9/21/85

S.H.,

Petitioner.

On Petition for Writ Of Certiorari to the Supreme Court of the State of Alaska

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BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1999

No. 98-1920

IN THE MATTER OF THE MINOR CHILD K.A.H.
D.O.B. 9/21/85

S.H.,

Petitioner.

On Petition for Writ Of Certiorari to the Supreme Court of the State of Alaska

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BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITION

IDENTITY AND INTEREST OF AMICUS CURIAE

ATLA is a national voluntary bar association whose approximately 50,000 members primarily represent plaintiffs in personal injury suits, civil rights and employment rights cases, and commercial litigation.[1] Letters of consent of the parties to the filing of this brief have been filed with the Clerk of this Court.

This case is of great importance to ATLA, its members and their clients. The desperate situation faced by the young

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than amicus curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

girl and her family in this case is familiar to ATLA members in every part of the country. So is the ethical dilemma faced by the girl's attorney. Every day, trial lawyers represent Americans who have been seriously injured because of a defendant's negligence. Loss of income, mounting medical bills and the necessities of food, clothing and shelter place these families under enormous stress. The very defendants who placed these families in dire straits can exploit their advantage and pressure to settle their meritorious claims for inadequate amounts.

In these circumstances, ATLA believes that an attorney who advances money to tide the client over until the claim is resolved advances the cause of justice. That such an attorney would be deemed guilty of unethical conduct is, in ATLA's view, unconscionable. ATLA has long criticized the American Bar Association position, adopted in 1953 and followed by many states, which condemns attorneys who make such humanitarian loans to clients. ATLA believes that enforcement of this rule violates Americans' constitutional right of access to the courts and the due process rights of attorneys.

REASONS FOR GRANTING THE WRIT

I. STATEMENT OF THE CASE.

The facts in this case, summarized by the Alaska Supreme Court, *In re KAH*, 967 P.2d 91 (Alaska 1998), and set forth in detail in the Appellant's brief in that Court [Alaska App. Br.], spotlight the important constitutional issues which ATLA urges this Court to address.

K.A.H was seven years old in 1993 when her father was killed. P.K.H. was a 34-year-old merchant seaman on a commercial crab vessel fishing hear St. Paul Island, Alaska. He was struck by a 200-pound steel davit. (The davit was part of the hydraulic longline fishing gear. Triangular in shape and attached to the side of the vessel, the davit held the line away from the vessel.) He suffered four broken ribs that

punctured both lungs. P.K.H. died slowly aboard the vessel following six hours of excruciating pain. (Alaska App. Br. at 3-4).[2]

K.A.H's mother, S.H., retained Gerald W. Markham, an attorney highly qualified and experienced in litigating on behalf of injured seamen and their families (Alaska App. Br. at 7 n.15). In August, 1993, S.H. was appointed the personal representative of P.K.H.'s estate. Markham then instituted a wrongful death and survival action against under the Jones Act, 46 U.S.C. §688 (1975 & Supp. 1998) for the benefit of K.A.H. as P.K.H.'s sole heir and wrongful death beneficiary. (Pet. at A-2).

The tragic death of K.A.H's father left the family in bleak financial condition, with few resources to meet even the barest necessities of life. By summer 1994, K.A.H and her mother had been evicted from their home and were living in a parked car. (Pet. at A-3) Seeing the family's desperate circumstances, Markham arranged to loan small sums amounting to several hundred dollars at no interest to S.H. on condition that the loans be repaid from the proceeds of the wrongful death recovery. (Alaska App. Br. at 11) Markham also persuaded S.H.'s father in Wisconsin to take them in. (*Id.* at 12). December, 1994, S.H. was needed in Alaska for deposition and to assist in preparing the case. Markham arranged a loan for airfare from Wisconsin and rent for an apartment in Kodiak. (Pet. at A-3) As the case dragged on into 1995, Markham arranged for an additional loan of $1,000. (*Id.*)

Preparation and negotiation in the case continued for about two years, during which defendant made an offer of $175,000, which was deemed inadequate. Defendant interpleaded the manufacturer of the fishing gear, which did not defeat plaintiff's unseaworthiness claim but added greatly

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[2] The Jones Act permits a survival action for recovery for predeath pain and suffering in addition to pecuniary loss and loss of support. See Steven F. Friedell, ed., Benedict on Admiralty ch. 81(c) (1998).

to the volume and complexity of the pretrial work and delayed trial. (Alaska App. Br. at 10)

Following mediation, the suit was eventually settled for $665,000. S.H sought approval of the settlement on behalf of the minor child. The standing master approved the amount of Markham's one-third contingency fee, litigation costs, and reimbursement of the advance to S.H. of airfare from Wisconsin. (Pet. at A-3-4).

In a demonstration that "no good deed goes unpunished," the master refused to approve reimbursement of loans for living expenses, amounting to approximately $1,900 as violating Alaska Rule of Professional Responsibility 1.8(e).[3] (Alaska App. Br. at 20-21). The superior court upheld the master's determination and the Alaska Supreme Court affirmed, holding that the rule does not deny or impede access to the courts under the state or federal constitution. (Pet. at A-2).

II. THE ALASKA SUPREME COURT HAS DECIDED AN IMPORTANT FEDERAL QUESTION WHICH THIS COURT SHOULD DECIDE.

ATLA respectfully submits that Alaska Rule of Professional Conduct 1.8(e) as applied by the court below to prohibit attorneys from making loans to existing clients to meet living expenses, impermissibly burdens the right of access to the courts. Similar rules are in effect in a majority of states and affect a great number of potential litigants. Because of the importance of this federal constitutional issue,

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[3] RULE 1.8 Conflict of Interest: Prohibited Transactions

* * *

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

ATLA urges the Court to grant the petition the decide whether the prohibition is invalid under the Due Process Clause of the Fourteenth Amendment and the Petition Clause of the First Amendment.

A. Ethical Prohibitions Against Humanitarian Loans to Clients Undermine Access to the Courts for Many Americans

An injured person seeking legal redress against a corporate defendant and its liability insurer is often a David facing Goliath. In this contest, however, time is not even-handed. Corporate Goliaths possess deep pockets, a cadre of counsel paid by the hour, and immunity from the exigencies of food, shelter, and other necessities that press so heavily on human parties. Indeed, the money that might ultimately be awarded in compensation to the injured plaintiff earns interest for the company while the litigation proceeds.

David, on the other hand, is often standing in quicksand. Medical bills mount as other living expenses continue. If plaintiff is a breadwinner who cannot earn a living because of his or her injury, the family will be overwhelmed all the more quickly. These plaintiffs are vulnerable to pressure to settle their claims for woefully inadequate amounts to meet their immediate needs. To exploit this vulnerability, defendants need only drag out the litigation process. In these circumstances, the defendant's most potent weapon is neither truth nor justice, but the mere passage of time.

At common law and throughout most of American judicial history, attorneys representing injured plaintiffs have advanced money or guaranteed loans to injured clients to enable them to keep the wolves from the door until their claims are resolved. One commentator summarized the state of the law as follows:

> Prior to 1955, the relatively few cases concerning the propriety of loans for living expenses produced a reasonably clear and consistent rule. According to these cases, an attorney acts improperly only if he offers

> money to a potential client as an inducement for employment . . . Otherwise, the courts favored loans for living expenses, recognizing that with them clients might withstand unjust settlement offers they would otherwise accept out of necessity.

William Robert Strelow, *Loans to Clients for Living Expenses,* 55 Calif. L. Rev. 1418, 1421-22 (1967).

Courts have long recognized that the practice of extending humanitarian loans to clients serves to safeguard access to justice for many who are most in need of it. In a leading decision, the Illinois Supreme Court stated:

> It is not uncommon for attorneys to commence actions for poor people and make advances of money necessary to the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in a case where without such aid he would be unable to enforce a just claim. . . . The practice of advancing money to the injured client with which to pay living expenses or hospital bills during the pendency of the case and while he is unable to earn anything may in a sense tend to foment litigation by preventing an unjust settlement from necessity, but we are aware of no authority holding that it is against public policy or any sound reason why it should be so considered.

In re McCallum, 341 Ill. 578, 589, 173 N.E. 827, 831 (Ill. 1930). *See also Johnson v. Great Northern Ry.*, 128 Minn. 365, 369, 1151 N.W.2d 125, 127 (1915)("It is not against public policy for an attorney to loan his client money to enable him to carry on the suit."); *In re Sizer*, 306 Mo. 356, 375, 267 S.W. 922, 928 (1924)(similar).

Nor are these concerns limited to society's poorest members. In modern America, a serious injury can spell disaster for middle class families, undermining their legal protections at the time they are needed most. It is true that in America, "while everyone can afford to get to the courthouse, the real benefits of our justice system are reserved for the fortunate few who can afford to stay." John J. Vassen, *The*

Case for Allowing Lawyers to Advance Client Living Expenses, 80 Ill. B.J. 16 (1992).

1954 marked a turning point in the bar's view of humanitarian loans to clients. In that year, the American Bar Association Committee on Ethics and Grievances issued a Formal Opinion which took the position that advancing living expenses violated the Canons of Ethics.[4]

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[4] ABA Committee on Professional Ethics and Grievances, Formal Opinion 288 (Oct. 11, 1954):

The opinion of the committee was stated by the Chairman and concurred in by all members of the Committee.

Canon 42, entitled "Expenses of Litigation" is as follows: A lawyer may not properly agree with a client that the lawyer shall pay or bear the expense of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

Canon 10, entitled "Acquiring an Interest in Litigation" is as follows: The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

For a lawyer to make advances to an injured client to cover subsistance for him and for the members of his family while the case is pending, does not constitute the advancement of expenses, the latter term referring to court costs, witness fees and expenses resulting from the conduct of the litigation itself, and not expenses unconnected with the litigation, although resulting from the accident.

For a lawyer to advance such living costs is similar to making an advance on account of the prospective verdict. Clearly there is no expectation of reimbursement except out of the verdict. Accordingly, a lawyer who makes such advances acquires thereby an interest in the subject matter of the litigation which he is conducting, in violation of Canon 10. We have read the opinion of the Supreme Court of Illinois in People v. McCallum, 173 N.E. 827, 830-1 (1930), in which it is stated that the advancement of living expenses by a lawyer is contemplated and justifiable under Canon 42. We are not convinced by the reasoning of the majority of the Court on this issue, and are of the opinion that Canon 42 furnishes no justification for such advances.

The proposed practice also would violate Canon 6, precluding a lawyer from representing conflicting interests, and imposing upon the lawyer the duty to represent his client with undivided fidelity. While, as pointed out by Professor Cheatham in his Case Book, Page 170 n., there is an inescapable conflict of interest between the attorney and his client with regard to counsel fees, this conflict of interest need not and should not be extended to permit the lawyer to acquire an additional stake in the outcome of the suit which might lead him to consider his own recovery

The president of the National Association of Compensation Claimants Attorneys (which later became ATLA) published an article condemning the Opinion. Payne H. Ratner, *Advancing Money to Clients - Whether Unethical*, 15 NACCA L.J. 410 (1955). The Kansas Bar subsequently sought to disbar Ratner, on charges that included arranging loans to injured railroad workers who were clients. The Kansas Supreme Court dismissed the charges noting:

> 'It has never been held violative of law or public policy to give financial aid to a poor suitor who is prosecuting a meritorious cause of action. . . . The law does not tolerate the notion that a powerful defendant may force the abandonment of a suit whenever he is able to exhaust the slender means of a weak antagonist.'

In re Ratner, 399 P.2d 865, 874 (Kan. 1965), quoting *Jahn v. Champagne Lumber Co.*, 157 F. 407 (7th Cir. 1908).

Nevertheless, the ABA position against advancing client expenses was incorporated into DR5-103(B) of the Model Code and then into 1.8(e) of the Model Rules. The ABA imprimatur was sufficient to persuade the great majority of states to adopt these rules for the governance of their bars. Amicus suggests, however, that many of these states did so without close examination of this provision and its ramifications.

No precise figures are available, but the practice of advancing living expenses for humanitarian reasons

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rather than that of his client, and to accept a settlement which might take care of his own interest in the verdict but not advance the interest of his client to the maximum degree. Such an extension would be inconsistent with the lawyer's duty of undivided fidelity to this client.

Finally, the practice, if publicized, constitutes a holding out by the lawyer of an improper inducement to clients to employ him, in addition to the assurance of performing legal services for the client (See Canon 27).

Accordingly, we are of the opinion that the activity with respect to which an opinion has been requested would constitute a clear violation of the Canons of Professional Ethics.

continues to be widely regarded as very common, if clandestine. Strelow, *supra*, at 1419; Bruce A. Green, *Lawyer Discipline: Conscientious Avoidance, and Prosecutorial Discretion*, 66 Fordham L. Rev. 1307, 1308 n.6 (1998).

Eight jurisdictions have, on reflection, rejected the ABA position against advancing living expenses to existing clients.[5]

Louisiana has done so through judicial decision. In *Louisiana State Bar Ass'n v. Edwins*, 329 So. 2d 437 (La. 1976), the court explicitly recognized that when an attorney is forbidden to assist an injured client with living expenses, the client "may be deprived of the only effective means by which he can wait out the necessary delays that result from litigation to enforce his cause of action. He may, for reasons of economic necessity and physical need, be forced to settle his claim for an inadequate amount." *Id.* at 446. The court concluded that the state's ethics rule forbidding such humanitarian loans "

> places an unreasonable burden upon an individual's right to enforce claims allowed him by law might be deemed violative of the access to courts guaranteed to all our people by our state constitution."

Id.

B. The Prohibition of Advancing Living Expenses to Client Infringes the Right of Access to the Courts Under the Due Process Clause.

Amicus submits that prohibiting such advances impinges upon the fundamental right of access to justice. The

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[5]Alabama Rule of Professional Conduct 1.8(e)(3); California Rule of Professional Conduct 4-210(A)(1) & (2) (1993); District of Columbia Rule of Professional Conduct 1.8(d)(2)(1992); Minnesota: Rule of Professional Conduct 1.8(e)(3)(1992); Montana Rule of Professional Conduct 1.8(e)(3); North Dakota Rules of Professional Conduct 1.8(e); Texas Disciplinary Rule of Professional Conduct 1.08(d)(1); Vermont Code of Professional Responsibility DR 5-103(B).

prohibition cannot withstand strict scrutiny -- indeed, the rationale of the prohibition does not even pass muster under the minimal rational basis test.

Long ago, the Court located "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" in the Due Process Clause of the Fourteenth Amendment. *Missouri Pacific Ry. Co. v. Humes,* 115 U.S. 512, 521 (1885). More recently, the Court reiterated that the "right of access to the courts . . . is founded in the Due Process Clause." *Wolff v. McDonnell,* 418 U.S. 539, 579 (1974). *See also Bounds v. Smith,* 430 U.S. 817 (1977).

The Court has been particularly vigilant against state rules that would deny access to the courts to those of limited financial means. For example, in *Boddie v. Connecticut,* 410 U.S. 371, 375-76 (1971), the Court struck down a state law that conditioned a judicial decree of divorce on the party's ability to pay costs.

However, this Court has not had occasion to define the scope of the right enunciated in *Boddie.* The uncertainty is dramatically illustrated in the present case. Previously, the Alaska Supreme Court in *Bush v. Reid,* 516 P.2d 1215 (Alaska 1973), had held that a parolee could not be denied access to the civil courts to seek compensation for personal injuries arising out of an auto accident:

> [U]pon reflection we conclude that the denial of access to the civil courts rends the fabric of justice as surely here as in *Boddie.*
>
> Although the collision of automobiles results in a dispute at first subject to private resolution, often the reconciliation of competing interests may be accomplished only by resort to the formal judicial process. The state exercises a monopoly over that paramount process where the "private structuring of individual relationships and repair of their breach" has failed.

Id. at 1218. The court added that "the denial of access to the courts creates an unfair leverage in the potential defendant who may avoid or reduce a meritorious claim because the ordinarily penurious state of the parolee dictates an early settlement on whatever terms are available." *Id.* at 1219.

K.A.H's case would appear to present an even more clear-cut example of a state monopoly over the legal process, since even an out-of-court settlement on behalf of the minor child required court approval. (See Pet. at 2-3). Nevertheless, the Alaska court in this case afforded a much more narrow interpretation of this Court's decision in *Boddie*, finding it inapposite. (Pet. at A-9-11).

ATLA submits that this Court should grant the petition to clarify the scope of the due process right of access to the courts.

C. The Prohibition of Advancing Living Expenses to Client Infringes the Right of Petition Under the First Amendment.

This Court has also held that the "right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983). *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)("[T]he right of access to the courts is indeed but one aspect of the right of petition.").

This Court has also relied on the First Amendment to invalidate attempts by state bars to enforce ethical rules that limit access to justice for those with limited resources. In *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), the Virginia State Bar had obtained an injunction against the union's plan to provide counsel to injured workers. The Court struck down the injunction. Because the union's activity was the object of the injunction, the Court's analysis focused on the First Amendment association rights of the union members. The Court made clear, however, that the right to petition was also implicated:

> A State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. . . . The right to petition the courts cannot be so handicapped."

377 U.S. at 7. In *United Transportation Union v. Michigan Bar*, 401 U.S. 576 (1971), the Court invalidated a similar injunction, one provision of which prohibited the union from representing that the attorney would "defray expenses of any kind." The Court held this portion of the injunction invalid "for the same reasons that the provision limiting fees is invalid." 401 U.S. at 585 n.9. Again, the Court's focus was again on the union's conduct. However, the Court's holding that the First Amendment bars a state from forbidding a union to inform members that attorneys may "defray expenses" implicitly suggests that states may not directly prohibit the attorneys from engaging in such activity. Significantly, Justice Harlan noted that "it is not generally improper for an attorney to make advances to clients." 401 U.S. at 597, 91 S. Ct. at 1087 (Harlan, J., dissenting in part).

The Court has also made it clear that the First Amendment Right of Petition precludes a state from eroding or burdening access to the courts through indirect means:

> We start with the premise that the rights to assemble peaceably and to petition for a redress or grievances are among the most precious of the liberties safeguarded by the Bill of Rights. . . . The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence

United Mine Workers of America v. Illinois State Bar Association, 389 U.S. 217, 222 (1967). Referring to its decision in *Trainmen*, the Court stated that, although "the States have broad power to regulate the practice of law," the dangers of baseless litigation and conflicts of interest were "distant" and "too speculative" to "justify a complete prohibition of the Trainmen's efforts to aid one another in assuring that each injured member would be justly compensated for his injuries." Id. at 222-23.

As noted, this Court's strong language in defense of access to courts as safeguarded by the First Amendment Right of Petition occurs in cases involving state restrictions directed against union activity. ATLA suggests that the right of petition affords protections to civil litigants independent of the First Amendment rights of speech and assembly. Indeed, historically, the right of petition was viewed in 18th Century England and America as a separate right, afforded even greater protection than the rights of free speech and assembly, and the drafting of the Petition Clause of the First Amendment reflects this view. *See* Julie M. Spanbauer, *The First Amendment Right to Petition Government For A Redress of Grievances: Cut From A Different Cloth,* 21 Hastings L.Q. 15, 16 & 34-42 (1993).

The court below in this case, however, ruled that the First Amendment right of access to the courts enunciated in *Trainmen* does not exist outside the context of collective "group legal action." (Pet. at A-13)

ATLA urges the Court to grant the Petition to decide the important and unresolved scope of the rights of litigants under the Petition Clause of the First Amendment

D. The Prohibition Against Advancing Living Expenses Advances No Compelling State Interest and Lacks any Rational Relationship to State Objectives.

State law that "impinges" upon or "interferes" with a fundamental right, *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1 (1972), or "touches on" a fundamental

right, *Shapiro v. Thompson,* 394 U.S. 618, 638 (1969), is subject to strict constitutional scrutiny. Such intrusions on important rights may be upheld only if narrowly drawn and "necessary to promote a compelling governmental interest." 394 U.S. at 634

Three justifications are advanced in support of the prohibition: (1) The advance gives the attorney an improper financial stake in the client's claim, (2) the attorney is placed in a conflict of interest with the client, (3) permitting humanitarian loans will lead to improper solicitation of potential clients. See Advisory Opinion 288, *supra* n.2. Without conceding that these reasons rise to the level of compelling state interests, ATLA suggests that prohibiting advances of living expenses does not bear even the minimal rational relationship to those objectives.

1. Attorney's Stake. The fact that ARPC 1.8 (like Advisory Opinion 288) prohibits advances of living expenses while permitting advances of litigation expenses indicates that the state has no real interest in preventing attorneys from acquiring a stake in the outcome of litigation. In this case, for example, the court approved reimbursement to Markham for S.H.'s airfare to Alaska to assist in the case, yet disallowed repayment of a loan for S.H. to have a place to live while there. The attorney's financial stake was indistinguishable. Indeed, a contingency fee arrangement by definition gives the attorney a substantial stake in the case.

2. Conflict of Interest. A related argument is that the attorney's interest in securing repayment may lead counsel to settle a case for an inadequate amount, rather than risking losing at trial. There is a certain hypocrisy to the argument that a client is better off vulnerable to the pressure exerted by the defendant than to trust his or her own attorney to act in the client's interest.

The reality is that advising a client whether to accept a settlement offer or proceed to trial, is an important responsibility of the trial lawyer. If reimbursement of living expense loans creates a conflict of interest, it is surely

outweighed by reimbursement of expenses and the contingency fee itself.

3. Solicitation of Clients. In Amicus' view, it is not self-evident the state has a compelling interest in prohibiting truthful, non-deceptive disclosure that an attorney might make advances of living expenses where necessary to enable a client to pursue a claim. To an injured worker who can no longer provide for the family while the medical bills pile up, this may be as important a factor in choosing an attorney as the contingency fee rate or the advancement of litigation expenses.

In any event, the purported evil is improper solicitation, not the advancement of expenses itself. Any state interest should properly be addressed through the ethical rules regarding advertising and solicitation. A blanket prohibition against humanitarian loans bears no rational relationship to that interest.

The fact that the Alaska Supreme Court offered no justification for Rule 1.8, and indeed the "Bar Association concedes that the prohibition may not be justified," (Pet. at A-16) strongly suggests that there is no rational basis for the rule.

CONCLUSION

For the forgoing reasons, Amicus urges this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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